DOCKET

No. 08-728

Title:	Taylor James Bloate, Petitioner
	v.
	United States
Docketed:	December 4, 2008
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(07-2357)
Decision Date:	July 25, 2008
Rehearing Denied:	September 5, 2008

Questions Presented

Date	Proceedings and Orders
Dec 4 2008	Petition for a writ of certiorari filed. (Response due January 5, 2009)
Dec 29 2008	Order extending time to file response to petition to and including February 4, 2009.
Feb 4 2009	Brief of respondent United States in opposition filed.
Feb 18 2009	DISTRIBUTED for Conference of March 6, 2009.
Feb 18 2009	Reply of petitioner Taylor James Bloate filed. (Distributed).
Feb 23 2009	Record Requested .
Mar 25 2009	DISTRIBUTED for Conference of April 17, 2009.
Apr 20 2009	Petition GRANTED.
May 20 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 18, 2009.
May 20 2009	The time within which to file respondent's brief on the merits is extended to and including August 10, 2009.
Jun 18 2009	Joint appendix filed. Statement of costs received.
Jun 18 2009	Brief of petitioner Taylor James Bloate filed.
Jun 25 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 29 2009	The time within which to file respondent's brief on the merits is further extended to and including August 12, 2009.
Jul 16 2009	SET FOR ARGUMENT ON Tuesday, October 6, 2009.
Jul 30 2009	CIRCULATED.
Aug 12 2009	Brief of respondent United States filed. (Distributed)
Sep 11 2009	Reply of petitioner Taylor James Bloate filed. (Distributed)
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PETITION FOR WRIT OF CERTIORARI

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No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" (emphasis added). The question presented here is:

> Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1).

As the Eighth Circuit explicitly acknowledged below, this question has divided the courts of appeals. The Fourth and Sixth Circuits have answered it in the negative; the Eighth Circuit and seven other circuits have answered it in the affirmative.

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OPINIONS BELOW

The decision of the Eighth Circuit (App., *infra*, 1a-19a) is reported at 534 F.3d 893. The district court's decision (App., *infra*, 20a-24a) is available at 2007 WL 551740.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. Petitioner timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on September 5, 2008. App., *infra*, 25a-26a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(c)(1) of Title 18 of the United States Code provides, in pertinent part:

> [T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Section 3161(h) of Title 18 of the United States Code provides, in pertinent part:

> The following periods of delay shall be excluded in computing the time * * * within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.[1]

STATEMENT

The Speedy Trial Act requires a defendant to be tried within 70 days of indictment or from the date a defendant has first appeared in court, whichever is later. 18 U.S.C. § 3161(c)(1). If a defendant is not tried within this 70-day period, upon his motion, the pending charges must be dismissed. See 18 U.S.C. § 3162(a)(2).

Section 3161(h) enumerates eight general categories of time that are automatically excluded in "computing the time within which the trial * * * must commence." This case concerns the first such category, 18 U.S.C. § 3161(h)(1), which requires the exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight expressly enumerated

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[1] On October 13, 2008, Congress amended portions of 18 U.S.C. § 3161(h) to repeal obsolete statutory cross-references. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291. The amendments made no substantive changes to the statutory provisions at issue here, but several of the relevant subparagraphs were redesignated. As principally relevant here, § 3161(h)(1)**(F)** is now § 3161(h)(1)**(D)**, and § 3161(h)**(8)** is now § 3161(h)**(7)**. This petition uses the new designations; for clarity's sake, quotations referring to the prior designations have been altered (as indicated with bracketed text) to reflect the new designations. Both versions of the statute are reproduced in the appendix to this petition. See App., *infra*, 27a-48a.

subcategories of time. See 18 U.S.C. § 3161(h)(1)(A)-(H).[2] The basic question here is whether those specific illustrations inform what is *not* excludable under § 3161(h)(1). In other words, because Congress said that the list of illustrations in (h)(1)(A) through (h)(1)(H) is not *exhaustive*, does it follow that those illustrations express *no limitation of any kind* with respect to which periods are automatically excluded under § 3161(h)(1)?

More particularly, this case turns on whether the subcategory specifically addressing pretrial motions—§ 3161(h)(1)**(D)**—limits the exclusion of time relating to pretrial motions under the general standard articulated in § 3161(h)(1). Subparagraph (D) declares excludable "delay resulting from any pretrial motion, from the ***filing*** of the motion through the conclusion of the hearing on, or other prompt ***disposition*** of, such motion." 18 U.S.C. § 3161(h)(1)(D) (emphasis added). Subparagraph (D) thus plainly does not render excludable delays

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[2] The other general categories of time excluded under § 3161(h) are delays caused by: (2) deferral of prosecution for the purpose of allowing the defendant to demonstrate his good conduct; (3) the absence or unavailability of the defendant or an essential witness; (4) the fact that the defendant is mentally incompetent or physically unable to stand trial; (5) dismissal and refiling of the information or indictment, from the date the charge was dismissed to the date the time limitation would begin to run as to the subsequent charge had there been no previous charge; (6) the joinder of a defendant for trial with a codefendant as to whom the time for trial has not run; (7) a continuance granted by a judge on the basis of findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial; or (8) obtaining evidence in a foreign country. 18 U.S.C. § 3161(h)(2)-(8).

resulting from the ***preparation*** of pretrial motions. This case concerns whether—notwithstanding Congress's decision not to include pretrial motion preparation time within subparagraph (D)—such time is nonetheless automatically excludable under § 3161(h)(1)'s general standard.

As the Eighth Circuit expressly acknowledged below, the circuits are deeply divided on this issue. App., *infra*, 7a-8a. Two circuits have held that pretrial motion preparation time is not excludable under § 3161(h)(1), relying on the statute's plain language—most notably the specific treatment of pretrial motions in § 3161(h)(1)(D)—and Congress's rejection of a proposal to include pretrial motion preparation time within the scope of § 3161(h)(1). Eight other courts of appeals, including the Eighth Circuit below, have reached the opposite conclusion, holding that pretrial motion preparation time is a "delay resulting from other proceedings concerning the defendant." The split is stark, deeply entrenched, and important to the proper administration of the federal criminal justice system.

A. The District Court Proceedings

On August 2, 2006, police observed petitioner Taylor James Bloate driving erratically. After executing a traffic stop, the officers noticed two small bags of a white substance, later determined to be crack cocaine, in petitioner's car. App., *infra*, 2a. Petitioner was arrested. The car's passenger, petitioner's girlfriend, consented to a police search of her apartment, where police discovered drugs, a bulletproof vest, three firearms, and ammunition, as well as evidence suggesting that petitioner resided in the apartment. *Id.* at 2a-3a.

On August 24, 2006, petitioner was indicted for possession of a firearm by a felon and possession of crack cocaine with intent to distribute it. App., *infra*, 3a. The indictment triggered the start of the 70-day pretrial period mandated under the Speedy Trial Act. *Id.* at 6a. On September 7, 2006, petitioner moved for and was granted an extension of the deadline for filing pretrial motions. *Id.* at 3a. On October 4, 2006, a magistrate judge granted petitioner leave to waive the right to file pretrial motions. *Id.* at 3a.

On February 19, 2007,—two weeks before petitioner's trial was set to begin—petitioner filed a motion to dismiss the indictment under the Speedy Trial Act. App., *infra*, 4a. The district court denied the motion. It held that the Speedy Trial Act had not been violated because several periods of time were properly excludable from the 70-day period prescribed by the Act. *Id.* at 21a-24a. As particularly relevant here, the district court held that the 28 days allocated to the preparation of pretrial motions—from September 7, 2006, to October 4, 2006—were automatically excludable. *Id.* at 21a.

The district court also held excludable several other periods—none of which is at issue here—bringing the total excludable time to 134 days.[3] App., *infra*, 6a-13a, 21a-24a. It is undisputed that, had the district court not excluded the 28 days of pretrial

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[3] The district court excluded 40 days, from November 9, 2006, until December 18, 2006, because a plea agreement had been contemplated during that time. App., *infra*, 9a-11a, 22a-23a. The court also excluded the 66 days from December 20, 2006, to February 23, 2007, due to a continuance granted at the request of the defendant to resolve "severe" differences with counsel. *Id.* at 11a-13a, 23a.

motion preparation time, more than 70 non-excludable days would have elapsed between petitioner's indictment and the trial date, and the indictment therefore would have been dismissed.

Petitioner proceeded to trial on March 5, 2007. He was convicted and sentenced to 360 months' imprisonment. App., *infra*, 1a, 4a-5a.

B. The Court Of Appeals Decision

Petitioner ppealed his conviction, arguing (among other things) that the district court had erred in excluding the 28 days of pretrial motion preparation time under § 3161(h)(1).

The Eighth Circuit affirmed. The court expressly recognized that the circuits are divided as to whether pretrial motion preparation time is excludable under § 3161(h)(1), announcing that it "join[ed] the majority of circuits in holding that pretrial motion preparation time may be excluded under § 3161(h)(1), if the court specifically grants time for that purpose." App., *infra*, 8a. The court stated its agreement with courts that have read the categories specifically enumerated in § 3161(h)(1)(A)-(H) to offer merely "an illustrative rather than an exhaustive enumeration of [excludable delays]." *Id.* at 7a. (citations and internal quotations omitted). The court reasoned that a contrary rule risked creating a "trap for trial judges," in which willingness to accommodate a defendant's request for extra time might result in dismissal of a case. *Id.* at 7a-8a.

The Eighth Circuit specifically acknowledged its disagreement with decisions of two other courts of appeals. Those courts, the Eighth Circuit noted, have relied on what they held to be "'strong[] indicat[ions]'"

in the text and legislative history of the Speedy Trial Act that Congress "'did not intend to exclude [pretrial motion preparation] time under § 3161(h)(1) at all.'" App., *infra*, 8a (quoting *United States* v. *Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998), and citing *United States* v. *Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993)).

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided As To Whether Pretrial Motion Preparation Time Is Excludable Under 18 U.S.C. § 3161(h)(1)

Section 3161(h)(1) of the Speedy Trial Act provides that delays "resulting from other proceedings concerning the defendant" do not count toward the Act's 70-day time limitation. The Act provides an illustrative list of such excludable time in eight subparagraphs, § 3161(h)(1)(A)-(H), including subparagraph (D), which addresses with precision the exclusion of time relating to pretrial motions. That provision declares excludable "delay resulting from any pretrial motion, from the ***filing*** of the motion through the * * * ***disposition*** of, such motion." 18 U.S.C. § 3161(h)(1)(D) (emphasis added). The question in this case is whether time granted for the ***preparation*** of pretrial motions is excludable under § 3161(h)(1), notwithstanding subparagraph (D)'s specific treatment of the exclusion of time relating to pretrial motions.

As the court below expressly acknowledged, the circuits are divided on this question. App., *infra*, 8a. Fully ten circuits have addressed the question and have reached diametrically opposite conclusions. The

Fourth and Sixth Circuits have held that pretrial motion preparation time is not excludable under § 3161(h)(1); the First, Second, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have, as did the Eighth Circuit here, held to the contrary.

A. The Decision Below Squarely Conflicts With Two Other Circuits' Construction Of § 3161(h)(1)

The Fourth and Sixth Circuits have squarely held that pretrial motion preparation time is not excludable under § 3161(h)(1). See *United States* v. *Jarrell*, 147 F.3d 315, 317 (4th Cir. 1998); *United States* v. *Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993). In both cases—as here—that time (coupled with other nonexcludable delays) exceeded the 70-day statutory limit. *Jarrell*, 147 F.3d at 316-317; *Moran*, 998 F.2d at 1372. And in both cases—in stark contrast to the decision below—the courts concluded that the language and structure of the Act do not support placing such time "within the automatic exclusion of § 3161(h)(1)." *Jarrell*, 147 F.3d at 317; see also *Moran*, 998 F.2d at 1370-1371.

In evaluating whether Congress intended for pretrial motion preparation time to qualify as a "delay resulting from other proceedings concerning the defendant," 18 U.S.C. § 3161(h)(1), those courts relied heavily on the fact that subparagraph (D) specifically addresses delays attributable to pretrial motions. Those courts deemed it highly probative that subparagraph (D) precisely defines excludable time to include only the period ***from*** the "filing" of a pretrial motion through its "disposition"—with "[t]ime allotted for the *preparation* of a pretrial motion * * * 'conspicuously absent'" from the specific subpara-

graph addressing pretrial motions. *Jarrell*, 147 F.3d at 317 (quoting *United States* v. *Hoslett*, 998 F.2d 648, 655 (9th Cir. 1993) (emphasis added)); see also *Moran*, 998 F.2d at 1370-1371.

Those courts have recognized that § 3161(h)(1)'s subparagraphs—including subparagraph (D)—are "merely illustrative" of the delays that are excludable, but have treated Congress's evident decision "not to include [preparation] time within the scope of the delay excludable under § 3161(h)(1)([D])" as a strong "indicat[ion] that it did not intend to exclude such time under § 3161(h)(1) at all." *Jarrell*, 147 F.3d at 317; see also *Moran*, 998 F.2d at 1370-1371. As the Fourth Circuit put it, "the [Speedy Trial] Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial calculation." *Jarrell*, 147 F.3d at 317 (quoting *United States* v. *Rojas-Contreras*, 474 U.S. 231, 239-240 (1985) (Blackmun, J., concurring in the judgment)).

The Fourth Circuit has further explained that the enactment history of § 3161(h)(1) confirms that "Congress made a deliberate decision not to include pretrial motion preparation time within the ambit [of mandatorily excluded time]." *Jarrell*, 147 F.3d at 317. When Congress enacted amendments to the Speedy Trial Act in 1979, that court observed, the Senate Judiciary Committee specifically considered exclusions for pretrial motion preparation time under § 3161(h)(1) but determined "that *excluding time for the preparation of motions would be 'unreasonable.'*" *Jarrell*, 147 F.3d at 317 (quoting S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979)) (emphasis added).

Indeed, the Fourth Circuit noted, Congress contemplated that *some* preparation time could be excluded—in a narrowly circumscribed set of circumstances and under a different (and significantly more restrictive) provision of the Act. *Jarrell*, 147 F.3d at 318 (citing S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979)) (noting that legislators intended that such exclusions would be permitted only if they satisfy the "ends of justice" standard established by § 3161(h)(7)).

Notably, the Fourth Circuit was not swayed by the fact that it was the defendant who sought the additional preparation time. That court specifically "recognize[d] that automatically excluding additional pretrial motion preparation time granted at a defendant's request has intuitive appeal in that the defendant has brought the delay upon himself." *Jarrell*, 147 F.3d at 318. But that court further recognized that, in addition to its incompatibility with the text and legislatively intended operation of the provision, "[s]uch an approach * * * denigrates the interest of the public by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Ibid.*; see also *Moran*, 998 F.2d at 1371 ("[T]he burden should not be on the defendant to take affirmative steps to keep the speedy-trial clock running.").

B. Eight Circuits Have Held That Pretrial Motion Preparation Time Is Excludable Under § 3161(h)(1)

With the decision below, eight courts of appeals have reached the opposite conclusion, holding that pretrial motion preparation time must be excluded under § 3161(h)(1). See *United States* v. *Oberoi*, No. 04-4545-cr, 2008 WL 4661454, at *10 (2d Cir. Oct. 23,

2008); *United States* v. *Mejia*, 82 F.3d 1032, 1035-1036 (11th Cir. 1996); *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir. 1989); *United States* v. *Wilson*, 835 F.2d 1440, 1444-1445 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985); *United States* v. *Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982).

Those decisions rely principally on the appearance of the phrase "including but not limited to" before the list of examples of excludable time in § 3161(h)(1). *Bloate*, App., *infra*, 7a-8a; *Lewis*, 980 F.2d at 564; *Mobile Materials*, 871 F.2d at 913; *Jodoin*, 672 F.2d at 238. The "particular intervals [of time] in subsections A through [H]," those courts have emphasized, "are illustrative rather than exhaustive." *Tibboel*, 753 F.2d at 610. Accordingly, they reason, subsection (D)'s specific treatment of pretrial motions—and its exclusion of time only from "filing" through "disposition"—"is but an illustration" of what may be excluded under "the general language" of (h)(1), *Jodoin*, 672 F.2d at 238, and not a limitation on what is excludable.

In some instances, those courts have sought support from the legislative history of § 3161(h)(1). The First Circuit, for example, held it significant that Congress intended the statute "to cover more than the examples provided in clauses such as ([D])," as evidenced by "the Senate's Report[,] which states, 'the list of proceedings concerning the [defendant] is not intended to be exhaustive.'" *Jodoin*, 672 F.2d at 238 (quoting S. Rep. No. 212, *supra*, at 10 (alteration omitted)). Likewise, the Tenth Circuit saw this as an "invitation implicit in the legislative history" to

create "addition[s] to the list of proceedings that automatically toll the speedy trial clock." *Mobile Materials*, 871 F.2d at 913[4]; see also *Lewis*, 980 F.2d at 564.

Notably, the Ninth Circuit—even as it adhered to circuit precedent allowing the exclusion of pretrial motion preparation time under § 3161(h)(1)—has acknowledged the force of the contrary argument. It observed that, although § 3161(h)(1) excludes the time during which a pretrial motion is pending for decision, "a similar exclusion for delay caused by motion preparation time is conspicuously absent." *United States* v. *Hoslett*, 998 F.2d 648, 655 (9th Cir. 1993). "Had Congress intended the general pretrial motion preparation exclusion," the court recognized, it "would have included it expressly in the amendments relating to delays from pretrial motions." *Ibid.* But because *Lewis*, 998 F.2d at 564, had previously held that time the trial judge "expressly designate[d]" for the preparation of motions must be excluded under § 3161(h)(1), *Hoslett* held that only such time—*i.e.*, time granted beyond that allotted in a district court's standard scheduling order—is to be excluded. 998 F.2d at 657.[5]

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[4] The Tenth Circuit acknowledged that the legislative history also reflected the "Senate Judiciary Committee's reservations about enlarging the period automatically excluded by pretrial motions practice," particularly motion preparation time. *Mobile Materials*, 871 F.2d at 914.

[5] There is further confusion even among the courts of appeals that have held that pretrial motion time is excludable under § 3161(h)(1). At least one court applies a rule that excludes all pretrial motion preparation time from the speedy trial calculation as long as the judge specifically grants time for such

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The conflict on this issue is stark, widespread, and openly acknowledged among the lower courts.[6] This Court's review is necessary to resolve this division and to provide uniform guidance to the district judges, prosecutors, and defendants who confront this issue on a daily basis.

II. The Majority Rule Misreads The Speedy Trial Act And Ignores Congress's Intent

The Eighth Circuit's decision is plainly wrong. The rule adopted below violates the statute's plain text and reads the express limitation of § 3161(h)(1)(D) out of the statute altogether. It like-

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purpose, see *United States* v. *Montoya*, 827 F.2d 143, 153 (7th Cir. 1987), but others distinguish between preparation time granted at a defendant's request (excludable) and routine time granted *sua sponte* by the court (non-excludable), see, *e.g.*, *United States* v. *Williams*, 197 F.3d 1091, 1093-1095 (11th Cir. 1999) (holding that time granted *sua sponte* is not excludable because "such a routine time prescription is no 'delay' in bringing the defendant to trial," and "[t]o qualify as an excluded period under § 3161(h)(1), the period must constitute a 'delay'"); see also *Hoslett*, 998 F.2d at 657 ("Only where there is a specific request for more pretrial motion preparation time than is routinely established by the district court in its standard scheduling order may such preparation time be excluded."). Dissenting in *Hoslett*, Judge Kozinski argued that "nothing in the language or reasoning of [a prior opinion] supports any such distinction" and that, if the majority could resort to that distinction, "then there's no case we can't distinguish if we set our minds to it." 998 F.2d at 660 (Kozinski, J., dissenting in part).

[6] The Third Circuit, which has yet to resolve this issue, has correctly observed that the "Courts of Appeals have disagreed on whether delay attributable to the preparation of pretrial motions" must be excluded under § 3161(h)(1). *United States* v. *Fields*, 39 F.3d 439, 444 n.3 (1994).

wise ignores the fact that Congress specifically considered—but rejected—a proposal to exclude pretrial motion preparation time under § 3161(h)(1).

A. The Text And Structure Of § 3161(h)(1) Do Not Permit Exclusion Of Pretrial Motion Preparation Time

1. Section § 3161(h)(1) excludes "delay resulting from other proceedings concerning the defendant." 18 U.S.C. § 3161(h)(1). The statute does not define the term "other proceedings concerning the defendant"; instead, it offers an illustrative list of eight specific subcategories of such exclusions. See 18 U.S.C. § 3161(h)(1)(A)-(H).

In subparagraph (D) of § 3161(h)(1), Congress directly addressed delay associated with pretrial motions. That provision excludes "delay resulting from any pretrial motion, ***from the filing*** of the motion through the conclusion of the hearing on, or other prompt ***disposition*** of, such motion." 18 U.S.C. § 3161(h)(1)(D) (emphasis added). By its terms, subparagraph (D) does not exclude delay caused by the ***preparation*** of pretrial motions. On that much, the courts and the parties appear to agree.

The Eighth Circuit erred, however, in concluding that the specific guidance with respect to pretrial motions contained in subparagraph (D) exerts no interpretive influence on the general standard articulated in § 3161(h)(1). The Eighth Circuit reasoned that, because the list of examples in § 3161(h)(1)(A)-(H) is not exhaustive, pretrial motion preparation time is necessarily excludable under § 3161(h)(1). App., *infra*, 7a-8a. But that conclusion simply does not follow: The fact that Congress did not intend to

predict *every* application of § 3161(h)(1) does not answer whether *this* particular delay is excludable.

Moreover, the Eighth Circuit made *no* attempt to confront the contrary—and far more natural—reading of the statute adopted by the Fourth and Sixth Circuits. Those courts apply the venerable interpretive principle that "[a] specific provision controls over one of more general application." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991). Because § 3161(h)(1)(D) specifically addresses delays resulting from pretrial motions—declaring only the time from "filing" through "disposition" as excludable—the general standard in § 3161(h)(1) cannot circumvent that limitation. That is, subparagraph (D) provides an express and definitive specification of which pretrial motion delays are excludable under § 3161(h)(1). See *Jarrell*, 147 F.3d at 317 ("Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)([D]) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all."); *Moran*, 998 F.2d at 1370-1371 ("The statute expressly excludes only the period 'from the filing of the [pretrial] motion through the * * * disposition of * * * such motion.' The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations.") (internal citation omitted). In other words, if Congress intended preparation time to be encompassed within the § 3161(h)(1) exclusion, it would not have drafted subparagraph (D) in so restrictive a fashion.

The limitation expressed in subparagraph (D) is no accident. Whereas Congress specified a precise

starting and ending point for excludable time attributable to pretrial motions, the neighboring subparagraphs are written in far more capacious terms. Subparagraph (A), for example, excludes "delay resulting from any proceeding, *including* any examinations, to determine the mental competency or physical capacity of the defendant." 18 U.S.C. § 3161(h)(1)(A) (emphasis added). The word "including" makes clear Congress's intent that examinations not be the only type of competency proceeding excludable under § 3161(h)(1). Likewise, subparagraph (C) broadly excludes "delay resulting from any interlocutory appeal," without specifying any express or implicit limitation. 18 U.S.C. § 3161(h)(1)(C). Presumably, such permissive language renders excludable time spent preparing the appeal after the notice of appeal has been filed, not just the time between filing and disposition of the briefs.

Particularly when the provision is viewed in its statutory context, it is difficult to believe that Congress carefully calibrated the exclusion for pretrial motions under subparagraph (D) yet left the barn door open for other pretrial motion exclusions under the general standard articulated in § 3161(h)(1). Congress could have defined excludable time as "including" the time from filing to disposition. It did not. Rather, it carefully circumscribed the boundaries of subparagraph (D) to reach *only* time *after* such motions have been filed. The rule adopted by the court below renders superfluous all the language of subparagraph (D) that appears after the first comma—*i.e.*, it reads "delay resulting from any pretrial motion, from the filing of the motion * * * through * * * disposition" as if Congress had stopped after the first six words. Such an approach is

improper. See *United States* v. *Santos*, 128 S. Ct. 2020, 2028 n.6 (2008) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous."); *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting *Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883)); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008) ("[W]hen a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows."); *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (interpreting the "residual clause" of 9 U.S.C. § 1 in light of its specific clauses).

2. The Eighth Circuit's decision misreads the text of the statute for yet another reason: Time spent preparing pretrial motions is not a delay "resulting from *other proceedings*" concerning the defendant. 18 U.S.C. § 3161(h)(1) (emphasis added). A "proceeding" regarding pretrial motions does not begin until—as the text of § 3161(h)(1)(D) envisions—the motion is actually filed.[7] Moreover, § 3161(h)(1) excludes only time "*resulting* from" such proceedings, which contemplates delays that *follow* from the commencement

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[7] Accordingly, the Second Circuit was misguided when it suggested in *Oberoi*, 2008 WL 4661454, at *10, that all pretrial motion preparation time is excludable under § 3161(h)(1) because the time necessary to prepare a *response* after filing is excludable under the express terms of subparagraph (D) (excluding time from "filing" through "disposition"). The "other proceeding" commences upon the filing of the motion.

of the "other proceeding," not those that *precede* or are merely associated with it.

Congress limited the reach of § 3161(h)(1) for good reason: Otherwise, virtually *all* pretrial delays would be excludable, eviscerating the statute. The principal argument advanced to support the Eighth Circuit's rule is that the examples of "other proceedings concerning the defendant" contained in § 3161(h)(1)(A)-(H) are merely illustrative. App., *infra*, 7a. That logic not only is flawed (see *supra* pp. 14-15), but also would apply with equal force to almost *any* time granted to prepare for trial. In other words, if pretrial motion preparation time is a delay "resulting from" a "proceeding," then so is time granted to "prepare" for any number of pretrial tasks.

Such an exception would swallow the rule. Most important, it would render superfluous significant portions of § 3161(h)(7). That section permits the exclusion of delays that result from a continuance that the judge grants to allow the defendant, among other things, "reasonable time necessary for *effective preparation*." 18 U.S.C. § 3161(h)(7)(B)(iv) (emphasis added). If such pretrial preparation time is automatically excluded under § 3161(h)(1), as the logic of the Eighth Circuit's rule requires, then § 3161(h)(7)(B)(iv) is unnecessary, because any pretrial preparation delay that comes within the ambit of § 3161(h)(7)(B)(iv) will already be excluded by § 3161(h)(1).

B. The Enactment History Forecloses The Eighth Circuit's Understanding Of § 3161(h)(1)

The text and structure of § 3161(h)(1) are in full accord with the drafters' stated intent. In 1979, Congress determined that the original version of Section 3161(h)(1)(D)—which at that time vaguely excluded "delay resulting from hearings on pretrial motions"—required "legislative clarification." S. Rep. No. 212, *supra*, at 20; see also Speedy Trial Act of 1974, Pub. L. No. 93-619, ch. 208 § 3161(h)(1)(E), 88 Stat. 2076, 2077-2078. An early re-draft supported by the Department of Justice excluded all "delay resulting from the *preparation* and service of pretrial motions and responses and from hearings thereon." H.R. 3630, 96th Cong., 1st Sess. § 5 (1979) (emphasis added). But the Senate Judiciary Committee struck that broad language in favor of the present formulation. See S. 961, 96th Cong., 1st Sess. (1979).

The Judiciary Committee's decision to eliminate preparation time was deliberate:

> Although some witnesses contended that all time consumed by motions practice, from *preparation* through their *disposition*, should be excluded, the Committee finds that approach *unreasonable*. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)[7](B) reasonable preparation time for pretrial motions in cases presenting *novel* questions of law or *complex* facts.

S. Rep. No. 212, *supra,* at 33-34 (emphasis added); see also *Henderson* v. *United States*, 476 U.S. 321, 336-337 (1986) (White, J., dissenting) (quoting this language from the Senate Report).

The House Judiciary Committee agreed to the Senate's exclusion of time only between filing and disposition. H.R. Rep. No. 390, 96th Cong., 1st Sess. 10 (1979). The amended version of the Act became law on August 2, 1979. See Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, § 4, 93 Stat. 328. As this Court has previously observed when considering a separate question regarding the application of § 3161(h)(1), that legislative history confirms that Congress specifically chose not to exclude pretrial motion preparation time under § 3161(h)(1). See *Henderson*, 476 U.S. at 327 n.8 (noting that Congress intended a broad exclusion for time "*after the submission of pretrial motions*," but not "time spent *preparing pretrial motions*") (quoting S. Rep. No. 212, *supra*, at 34).

This Court has previously recognized that the Speedy Trial Act's legislative history is a useful tool in interpreting its provisions. See, *e.g.*, *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235-236 (1985) (interpreting 18 U.S.C. § 3161(c)(2)). More particularly, the Court has relied upon congressional refusal to adopt a Department of Justice proposal as evidence of Section 3161(h)'s meaning. See *United States* v. *Taylor*, 487 U.S. 326, 339-340, 340 n.11 (1988) (noting relevance of Congress's rejection of the Department's "proposal to restart the 70-day period following recapture of a defendant who has fled prior to trial" in construing § 3161(h)(3)(A)); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few

principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 392 -393 (1980) (Stewart, J., dissenting)). The history of § 3161(h)(1) is equally clear with respect to pretrial motion time. The Eighth Circuit's rule—which compels a result the drafters specifically deemed "unreasonable"—plainly violates Congress's stated intent.

III. This Case Presents A Recurring Issue Of National Importance

Whether § 3161(h)(1) requires the automatic exclusion of pretrial motion preparation time is a recurring and important question of federal law. As the many cases cited above make clear, this issue has arisen repeatedly and, indeed, has the potential to arise in almost every federal criminal prosecution. The Eighth Circuit's rule, moreover, undermines the important interests that the Speedy Trial Act protects.

A. This Issue Has Arisen Frequently And Can Arise In Virtually *Every* Federal Prosecution

The question presented here is no stranger to the federal courts. As explained above (*supra* pp. 7-13), ten federal courts of appeals have decided this question in recent years. Indeed, the Second Circuit decided this issue just several weeks ago. See *Oberoi*, 2008 WL 4661454 (2d Cir. Oct. 23, 2008).

The pervasiveness of this issue is no surprise. By its terms, the Speedy Trial Act applies in "*any* case

involving a defendant charged with an offense * * * in which a plea of not guilty is entered." 18 U.S.C. § 3161(a), (c) (emphasis added). Pretrial motions are themselves a feature of almost every case that goes to trial, and, consequently, whether such time is automatically excluded under § 3161(h)(1) is a question of great practical importance to the federal courts. More to the point, an area of the law so frequently applied and essential to the daily administration of criminal justice calls for the clarity and consistency that only this Court's review can provide.

B. The Eighth Circuit's Rule Undermines The Speedy Trial Act's Important Objectives

The Speedy Trial Act is no mere housekeeping statute; to the contrary, the Act safeguards important policies of our criminal justice system. By adding an automatic exclusion that Congress plainly did not intend, the rule adopted below distorts the Act's calibrated effort to advance crucial interests of the accused and the public.

1. Most important, the Act protects the defendant's ability to mount an effective defense. When trial is delayed, the likelihood increases that evidence will be lost or damaged and that witnesses will die, disappear, or forget events. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972); see also Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1898-1899 (2005). These are the "most serious" consequences of delay, "skew[ing] the fairness of the entire system." *Barker*, 407 U.S. at 532.

The Act also protects against excessive pretrial incarceration, the "core" of the right to a speedy trial. Brian P. Brooks, *A New Speedy Trial Standard for* Barker *v.* Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. Chi. L. Rev. 587, 596-597 (1994). Incarceration hinders a defendant's ability to mount a defense. It also can mean job loss, disruption of family life, and idle time spent without any recreation or rehabilitation. *Barker*, 407 U.S. at 532-533. "Imposing those consequences on anyone who has not yet been convicted is serious." *Ibid.* Even if an accused is not incarcerated during the period before trial, "he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Ibid.*

Legislators also recognized that some prosecutors will "rely upon delay as a tactic in the trial of criminal cases," H.R. Rep. No. 1508, 93d Cong. 7408 (1974), and the Act seeks to counter such abuses. To the same end, the Act discourages the bringing of hasty indictments. Because undue delay "could potentially result in [dismissal of the indictment with prejudice,] * * * the prosecution [has] a powerful incentive to be careful about compliance." *Zedner* v. *United States*, 547 U.S. 489, 499 (2006).

2. The Act was also designed "with the public interest firmly in mind." *Zedner*, 547 U.S. at 501. Speedy trials protect "confidence in the fairness and administration of criminal justice." S. Rep. No. 212, *supra*, at 6. This Court's recent holding in *Zedner* is instructive. In that case, the Court ruled that defendants may not prospectively waive their speedy trial rights. 547 U.S. at 500. The Court explained that "[a]llowing prospective waivers would seriously

undermine the Act because there are many cases * * * in which the prosecution, the defense, and the court would all be happy to opt out of the Act, *to the detriment of the public interest*." 547 U.S. at 502 (emphasis added). "Because defendants may be content to remain on pretrial release, and indeed may welcome delay," Congress chose not to empower them with the ability to circumvent the Act through waivers. *Id.* at 501-502 (citing S. Rep. No. 212, *supra*, at 29).

The Eighth Circuit's rule cannot be squared with the premises of *Zedner*. As the Fourth Circuit explained in rejecting an argument that delay attributable to a defendant's request should be excluded automatically, such an approach "denigrates the interest of the public" "by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Jarrell*, 147 F.3d at 318. The rule also pushes against "the legislative judgment that * * * the societal interest in prompt administration of justice * * * require[s], as a matter of law, that criminal cases be tried within a fixed period." S. Rep. No. 212, *supra*, at 6-7.[8]

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[8] This Court's recent grant of certiorari in *State* v. *Brillon*, 955 A.2d 1108 (Vt. 2008), cert. granted, 77 U.S.L.W. 3162 (U.S. Oct. 1, 2008) (No. 08-88), supplies no reason for refraining from resolving the statutory question here. The constitutional question presented in that case—whether delays attributable to a State-provided public defender are cognizable under the Speedy Trial Clause of the Sixth Amendment—is entirely distinct from the statutory question presented here, which has long divided the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

TAYLOR BLOATE,
Appellant.

Docket No. 07-2357

Submitted February 13, 2008
Filed July 25, 2008

Before RILEY, JOHN R. GIBSON, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Taylor James Bloate was convicted of one count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1), and one count of possession of cocaine with intent to distribute, 21 U.S.C. § 841(a)(1). The district court[1] sentenced him to 360 months' imprisonment. Bloate appeals, asserting a Speedy Trial Act violation and other trial and sentencing

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[1] The Honorable Stephen N. Limbaugh, Sr., United States District Judge for the Eastern District of Missouri.

errors. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

On August 2, 2006, officers saw three vehicles, including a Nissan, driving erratically. A few minutes later, they saw the Nissan parked in front of an apartment building, and began surveillance. Witnessing numerous people coming in and out of the building, they suspected drug activity. Eventually, two individuals left in the Nissan. When the driver committed several traffic violations, the officers tried to make a stop. The driver pulled to the side of the road several times, but then drove off as the officers approached. Finally, the driver stopped completely. As the officers approached, they saw two small bags of a white substance (later determined to be crack cocaine) on the driver's lap. The officers seized the cocaine and arrested the driver, identified as Bloate.

After *Miranda* warnings, Bloate repeatedly said, "I'm done, I'm done, I'm going to the penitentiary." He also stated that he did not initially stop because he was trying to find the crack cocaine. When asked about the apartment building, he said, "I don't live there, I don't got nothing to do with that place." The passenger was identified as Shanita Boclair, Bloate's girlfriend. She admitted living in the apartment building, consented to a search (both verbally and in writing), and provided officers with a key, which they used to enter the apartment. Boclair accompanied the officers during the search; no one else was in the apartment. Officers discovered a large closet with closed doors. Inside the closet, they found: (1) men's clothing; (2) a bulletproof vest; (3) three firearms (two loaded); (4) ammunition; (5) individually packaged

crack cocaine (totaling about 13.47 grams); (6) paperwork with Bloate's name; (7) Bloate's identification card; and (8) marijuana (about 10.33 grams). In the same room, officers discovered a rental agreement for the apartment, dated July 5, 2006, and signed by Bloate and Boclair.

The officers took the firearms, ammunition, bulletproof vest, drugs, and paperwork to the police station where Bloate was. When the officers entered the room with the items, Bloate said, "that's all mine, it's not hers, she's got nothing to do with my business." The officers again administered *Miranda* warnings. Bloate admitted living at the apartment and owning the items. During booking, officers seized $1,077 cash from Bloate's person.

The case then proceeded as follows:

- August 24: Bloate was indicted for being a felon in possession of a firearm, and possession with intent to distribute crack cocaine.

- September 7: Bloate moved to extend the deadline for pretrial motions, which was granted until September 25.

- September 25: Bloate waived his right to file pretrial motions.

- October 4: A magistrate judge conducted a hearing, finding Bloate's waiver voluntary and intelligent, and granted leave to waive his right to file pretrial motions.

- November 8: Bloate moved to continue the trial date. Also, Bloate, his counsel, the Assistant United States Attorney, and two police officers

met. Bloate signed a proffer agreement, and then admitted possession of the crack cocaine and firearms, and provided his sources for the drugs and firearms.

• November 9: The district court granted the motion, rescheduling the trial for December 18.

• December 13: The district court scheduled a change-of-plea hearing for December 20.

• December 20: At the hearing, Bloate decided not to change his plea to guilty, and requested new counsel. The district court rescheduled the trial for February 26, 2007.

• January 3: The district court appointed new counsel for Bloate.

• February 1: Bloate moved for leave to file pretrial motions out-of-time, and also to suppress physical evidence and statements.

• February 14: A magistrate judge denied Bloate's motions, finding he had waived his right to file pretrial motions.

• February 19: Bloate moved to dismiss due to a Speedy Trial Act violation.

• February 21: The district court denied the Speedy Trial Act motion.

• February 23: The district court rescheduled the trial for March 5.

• March 5: The two-day trial began.

At trial, the government presented the testimony of the officers at the scene of the arrest and search,

the firearms examiner who tested the firearms, the forensic chemist who tested the drugs, the fingerprint examiner who confirmed Bloate's previous convictions, and an expert on crack cocaine sales and distribution. In response, Bloate presented the testimony of his landlord, his son, and his son's girlfriend. The landlord testified that, on August 2, Bloate's lease was not final because there was still money due, but that Bloate had permission to store some items there. He also stated that the backdoor to the apartment building might have been open, allowing access to the apartment. Bloate's son, Cortez, testified that he was arrested about the same time, and that officers brought him to the scene of the search and placed him in a police car with his father. Cortez's girlfriend testified that the officers first searched the apartment she was in (immediately above Bloate's apartment), and that the back door to the apartment building was open. Before its rebuttal, the government requested admission of statements Bloate made during his November 8 proffer. Over objection, the court allowed the evidence. One officer, present at the proffer, testified as to Bloate's statements admitting possession and disclosing his sources. The district court denied Bloate's motion for judgment of acquittal. The jury found him guilty of both counts.

II.

A.

In the context of the Speedy Trial Act, this court reviews the district court's findings of fact for clear error and its legal conclusions de novo. *United States v. Lucas*, 499 F.3d 769, 782 (8th Cir. 2007) (en banc). The Act requires that a defendant's trial begin within

70 days after the indictment or the defendant's initial appearance, whichever is later, subject to certain exclusions. *See* 18 U.S.C. § 3161(c)(1), (h). If a defendant is not brought to trial within this time limit, upon motion of the defendant, the district court must dismiss the information or indictment. 18 U.S.C. § 3162(a)(2).

Bloate asserts that the district court erred in denying his motion to dismiss due to a Speedy Trial Act violation. The indictment was filed on August 24, so the Speedy Trial Act clock began August 25. *See* 18 U.S.C. § 3161(c)(1). Bloate argues that only one other day is excludable, September 7, thus making the 70th day November 3. The district court rejected this reasoning, finding that the time periods between September 7 and October 4, and November 9 and February 26, [were] excludable.

It is uncontested that the time period from August 25 to September 6 is non-excludable (13 days). The first issue is the period from September 7—the date the district court extended the deadline for filing pretrial motions—to October 4—the date Bloate formally waived his right to file pretrial motions, a total of 28 days.

The Speedy Trial Act excludes: "Any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(F). Here, Bloate never filed a pretrial motion. He requested an extension of the deadline for filing pretrial motions, but at that

deadline, instead of filing motions, he waived his right to do so. Thus, subsection (F) does not apply.

Even without applying subsection (F), six circuits hold that pretrial motion preparation time may be excluded, if the court specifically grants time for that purpose, because that time is "delay resulting from other proceedings concerning the defendant." *See United States v. Mejia*, 82 F.3d 1032, 1035–36 (11th Cir. 1996); *United States v. Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913–14 (10th Cir. 1989); *United States v. Wilson*, 835 F.2d 1440, 1444–45 (D.C. Cir. 1987); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985); *United States v. Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982). These circuits reason "that the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through J are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" *Lewis*, 980 F.2d at 564, *citing Wilson*, 835 F.2d at 1444; *Tibboel*, 753 F.2d at 610; *Jodoin*, 672 F.2d at 238; *see also, Mobile Materials, Inc.*, 871 F.2d at 913. One court notes that this construction eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act. *See Wilson*, 835 F.2d at 1444; *see also Mobile Materials, Inc.*, 871 F.2d at 913–14 ("The grant allows the district court to dispose of the difficult question of whether the defendant's interests are better served by an uninterrupted march to trial or by a pause in proceedings at the defendant's request for the preparation of pretrial motions.").

Two circuits decline to use § 3161(h)(1) to exclude time allowed for preparation of pretrial motions. *See United States v. Jarrell*, 147 F.3d 315, 317–18 (4th Cir. 1998); *United States v. Moran*, 998 F.2d 1368, 1370–71 (6th Cir. 1993). The Fourth Circuit reasons that "Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)(F) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." *Jarrell*, 147 F.3d at 317; *see also Moran*, 998 F.2d at 1370–71 ("The statute expressly excludes only the period 'from the filing of the [pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion.' The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations.") (internal citation omitted).

This court has acknowledged the circuit split, but not decided the issue. *See United States v. Suarez-Perez*, 484 F.3d 537, 539 n.2 (8th Cir. 2007). This court now joins the majority of circuits in holding that pretrial motion preparation time may be excluded under § 3161(h)(1), if the court specifically grants time for that purpose. Here, the district court expressly extended the deadline for filing pretrial motions, at Bloate's request. Therefore, the 28-day period between September 7 and October 4 is excludable. The fact that Bloate did not actually file any pretrial motions is irrelevant. *See Mejia*, 82 F.3d at 1036.

It is uncontested that the time period from October 5 to November 8, 35 days, is non-excludable, thus bringing the total to 48 non-excludable days.

The next issue is the time period from November 9—the date the district court granted Bloate's motion to continue the trial date—to December 18—the scheduled trial date, a total of 40 days.

The Speedy Trial Act specifically excludes:

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A). Subsection (B) then provides factors to consider in determining whether to grant such a continuance. 18 U.S.C. § 3161(h)(8)(B). Although the Act explicitly requires that the judge make an ends-of-justice finding before granting a continuance, it is ambiguous when that finding must be set forth in the record. *See* 18 U.S.C. § 3161(h)(8)(A); *Zedner v. United States*, 547 U.S. 489, 506–07, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006). "[A]t the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2)." *Id.* at 507, 126 S.Ct. 1976.

"Contemporaneity is not required . . . and a subsequent articulation suffices." *United States v. Stackhouse*, 183 F.3d 900, 901 (8th Cir. 1999) (per curiam), *citing United States v. Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981) ("While a court generally should make the findings required by section 3161(h)(8)(A) at the time it grants the continuance, the Speedy Trial Act does not require the court to make a contemporaneous record.").

Bloate argues that this time period is non-excludable. True, in granting the continuance on November 9, the district court did not set forth an ends-of-justice finding on the record. However, in denying Bloate's Speedy Trial Act motion on February 21, the district court stated:

> The court did not specify the reasons for the granting of defendant's request for a continuance, but in effect, did so on the basis of the motion. In the motion, defendant stated that 'Counsel needs additional time to investigate and prepare this matter for trial. Counsel believes that granting this continuance would outweigh the interests of the public and defendant [in] a Speedy Trial.' This should comport with the requirements of 18 U.S.C. § 3161(h)(8)(A).

This finding references one subsection (B) factor: "Whether the failure to grant such a continuance . . . would deny counsel for the defendant . . . the reasonable time necessary for effective preparation . . . ." 18 U.S.C. § 3161(h)(8)(B)(iv). *See Lucas*, 499 F.3d at 782–83 (ends-of-justice finding was sufficient, even though it could have been more detailed, where it specifically referenced one of the factors under § 3161(h)(8)(B));

United States v. Gamboa, 439 F.3d 796, 803 (8th Cir. 2006) ("the district court's order provided reasons for the court's finding by following the language of the statute, thereby demonstrating that the district court was aware of what requirements had to be met before a continuance could be granted.") (internal quotation marks and citation omitted). This explicit on-the-record finding is sufficient, even though not contemporaneous with the grant of the continuance. *See Stackhouse*, 183 F.3d at 901–02 (excluding time under § 3161(h)(8)(A) where the district court granted a continuance on April 23, 1998, and articulated its reasons on July 14, 1998). The 40-day period between November 9 and December 18 is excludable.

The next issue is the time period from December 20—the date the district court continued the trial date for a second time—and February 23—the date the district court continued the trial date for a third time, a total of 66 days. Again, Bloate asserts that this period is non-excludable. Again, the district court did not set forth an ends-of-justice finding in the record on December 20. The court did include one in its February 21 order:

> On December 20, 2006 it was obvious to the court, although specific findings were not made, that defendant and his counsel, at that time, were not able to resolve their conflicts. Although the court was reluctant to appoint counsel for the defendant at that late date, it appeared unwise not to do so as defendant should have had at least one further opportunity to have counsel of his choice, even at the government's expense. It was therefore obvious to the court that a delay was required in

> order that the ends of justice could more properly be served in this continuance. To force the defendant to go to trial on a date when a plea was to be implemented, when the defendant elected not to implement the plea agreement and express[ed] severe dissatisfaction with his attorney would, in fact, create serious consequences for the defendant. Granting these continuances obviously outweighed the best interest of the public and the defendant [in] a Speedy Trial.

This finding incorporates one of the § 3161(h)(8)(B) factors: "Whether the failure to grant such a continuance . . . would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation . . . ." 18 U.S.C. § 3161(h)(8)(B)(iv). *See Lucas*, 499 F.3d at 782–83. As above, this finding is sufficient, even though not contemporaneous. *See Stackhouse*, 183 F.3d at 901–02. The 66-day period between December 20 and February 23 is excludable.

The final issue is the time period from February 23—the date the district court continued the trial date for a third time—and March 5—the date the trial commenced, a total of nine days (not counting February 23, which was excluded above). It is not necessary to decide whether this period is excludable. Even if it is not, only 58 days passed between Bloate's indictment and trial, fewer than the 70 allowed by the Speedy Trial Act.

The Speedy Trial Act was not violated. The district court did not err in denying the motion to dismiss.

B.

Bloate argues that the district court erred in refusing to hear his pretrial motions, thus violating due process. When determining if a constitutional right has been waived, this court reviews the district court's factual findings for clear error, and the ultimate determination of whether a waiver occurred de novo. *United States v. Caldwell*, 954 F.2d 496, 504 (8th Cir. 1992). The waiver of a constitutional right must be knowing and intelligent. *Little v. Lockhart*, 868 F.2d 989, 991 (8th Cir. 1989), *citing Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). "A waiver is knowing and intelligent if made 'with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *United States v. Harper*, 466 F.3d 634, 643 (8th Cir. 2006), *quoting Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

Bloate maintains that his waiver was not knowing because he was not adequately informed of the consequences of a waiver. To the contrary, the transcript of the waiver hearing shows that the magistrate judge expressly explained the nature and consequences of a waiver in detail. The judge explained the nature of what Bloate was waiving by stating, "These types of motions often attack the actions of the police when they arrest somebody and whether they took the statements properly or took evidence or seized or searched or arrested people properly . . . ." The judge told Bloate that "once you

waive these motions today you can't come back [at a] later time and file them . . . ." Bloate said he understood. Finally, the judge told Bloate that "what you're giving up by waiving these motions is the right to have a judge make a finding that what the police did at the inception of your case was unconstitutional." Bloate again said he understood.

Bloate knowingly and intelligently waived his right to file pretrial motions. The district court did not err in refusing to hear his pretrial motions. *See United States v. Garrido*, 995 F.2d 808, 814–15 (8th Cir. 1993) (finding voluntary and knowing agreement to withdraw pretrial motions where the court explicitly stated that the defendant was withdrawing his motions with prejudice and made it clear that the defendant would not be able to raise the motions again).

Alternatively, Bloate asserts that even if he did waive his right to file pretrial motions, the district court should have allowed them out-of-time under Federal Rule of Criminal Procedure 12(e). Rule 12(c) allows the court to "set a deadline for the parties to make pretrial motions." Fed.R.Crim.P. 12(c). Rule 12(e) provides that a "party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) . . . . For good cause, the court may grant relief from the waiver." Fed.R.Crim.P. 12(e). This court "will reverse a decision declining to consider an untimely pretrial motion only for an abuse of that discretion." *United States v. Salgado-Campos*, 442 F.3d 684, 686 (8th Cir. 2006).

In his motion for leave to file his untimely pretrial motions, Bloate stated "that his previous waiver of

pretrial motions was not knowing or voluntary, rather, it was based on a misunderstanding between the Defendant and his previous attorney." As detailed above, Bloate's waiver was knowing and voluntary, due to the magistrate judge's explanation of the right and its consequences. Thus, Bloate offers no good cause justifying his delay. The district court did not abuse its discretion in denying his motion. *See id.* ("Because Salgado-Campos fails to show good cause justifying his delay, the district court was well within its discretion to deny his request for an extension of time in which to file pretrial motions.").

C.

Bloate asserts that the district court erred in admitting his statements during the November 8 proffer. The fourth paragraph of the proffer agreement, which he specifically initialed, states:

> [T]he government may use any statements made or other information provided by your client to rebut evidence or arguments materially different from any statements made or other information provided by your client. This provision is necessary to assure that no court or jury is misled by receiving information materially different from that provided by your client.

Bloate argues that he merely contested reasonable doubt, and did not offer any evidence or arguments that were materially different from the information he provided during the proffer. Rejecting this argument and allowing the evidence, the district court stated:

> While counsel indicates the defense in this matter is going to be reasonable doubt, I think it's rather obvious that the defense is that the government, of course, has to prove its case beyond a reasonable doubt but that the defendant simply was not involved with this matter, so accordingly, I think evidence of the proffer is appropriate to rebut that material. I don't think it necessarily is required under the agreement that the proffer rebut the defendant's testimony but the general nature of all of the evidence presented by the defendant as a part of his case as well as the cross-examination of the government's witnesses.

Statements made by a defendant in the course of plea negotiations, which may include proffer sessions, are usually inadmissible at trial. Fed.R.Evid. 410. *See also United States v. Velez*, 354 F.3d 190, 194 (2d Cir. 2004) (applying plea negotiation rules to proffer sessions). However, a defendant may waive these protections, so long as there is no indication "that the agreement was entered into unknowingly or involuntarily." *United States v. Mezzanatto*, 513 U.S. 196, 210, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). Here, Bloate does not assert that his waiver was unknowing or involuntary, instead focusing on whether the terms of the agreement actually allowed admission of his statements. Although he claims he only contested reasonable doubt, the heart of the testimony of two of his three witnesses—the landlord and his son's girlfriend—was that the apartment was not his and access was open. This testimony attempts to prove that Bloate did not possess the items found within the apartment, which is materially different than what he admitted during the proffer session. During the proffer, he specifically

admitted possessing the drugs and firearms in the apartment.

The district court did not err in admitting statements made by Bloate during the proffer session. *See United States v. Williams*, 295 F.3d 817, 820 (8th Cir. 2002) (upholding admission of proffer statement where defendant offered different testimony at trial).

D.

Bloate appeals the district court's denial of his motion for judgment of acquittal, asserting that the evidence was insufficient. Under Rule 29(a), a court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29(a). This court "reviews the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the government, resolving any conflicts in the government's favor, and accepting all reasonable inferences that support the verdict." *United States v. Urick*, 431 F.3d 300, 303 (8th Cir. 2005). A court should not weigh the evidence or assess the credibility of witnesses. *United States v. Hernandez*, 301 F.3d 886, 889 (8th Cir. 2002). The standard is strict, and this court will "reverse only if no reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Piwowar*, 492 F.3d 953, 955 (8th Cir. 2007) (internal citation and quotation marks omitted).

Bloate claims the government did not prove beyond a reasonable doubt his knowing possession of the firearms, a required element of § 922(g)(1), or his knowing possession of the cocaine, a required element

of § 841(a)(1). *See United States v. Claybourne*, 415 F.3d 790, 795 (8th Cir. 2005) (elements of being a felon in possession of a firearm); *United States v. Cuevas-Arrendondo*, 469 F.3d 712, 715 (8th Cir. 2006) (elements of possession of cocaine with intent to distribute). "Knowing possession can be actual or constructive, as well as sole or joint." *Piwowar*, 492 F.3d at 955. "Constructive possession is proven by showing that a defendant 'had ownership, dominion, or control over the contraband itself, or dominion over the premises in which the contraband is concealed.'" *United States v. Cole*, 380 F.3d 422, 425 (8th Cir. 2004), *quoting United States v. Schubel*, 912 F.2d 952, 955 (8th Cir. 1990).

Bloate stresses that a lot of people were around the apartment building, the back door was possibly open, and that he was not found inside. However, this argument relies on weighing the evidence, which this court does not do. Viewing the evidence most favorably to the government, there was sufficient evidence of Bloate's dominion over the bedroom where the firearms and cocaine were discovered. Inside the closet where the firearms were hidden, officers found paperwork with Bloate's name and Bloate's identification card. *See United States v. Johnson*, 474 F.3d 1044, 1049 (8th Cir. 2007) (evidence was sufficient to show knowing possession where defendant's identification card and cable bill were found in the same room as the firearm); *Claybourne*, 415 F.3d at 796 (evidence was sufficient to show knowing possession where defendant's identification cards, Social Security card, and telephone bill were discovered in the same bedroom as the firearms). Additionally, in the same room, officers recovered a rental agreement for that

apartment, signed by Bloate. Finally, Bloate admitted possession of the firearms and cocaine. This evidence was sufficient for the jury to find him guilty beyond a reasonable doubt.

The district court did not err in denying Bloate's motion for judgment of acquittal.

E.

Bloate appeals his sentence, contending that the district court violated his Sixth Amendment right to trial by jury by enhancing his sentence based on his prior convictions. This argument is foreclosed by precedent. *See, e.g., United States v. Booker*, 543 U.S. 220, 244, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 235, 240-44, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *United States v. Levering*, 431 F.3d 289, 295 (8th Cir. 2005); *United States v. Carrillo-Beltran*, 424 F.3d 845, 847-48 (8th Cir. 2005); *United States v. Wilson*, 406 F.3d 1074, 1075 (8th Cir.2005). No Sixth Amendment violation occurred.

III.

The judgment of the district court is affirmed.

APPENDIX B

[Filed February 21, 2007]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,
Plaintiff,

v.

TAYLOR JAMES BLOATE,
Defendant.

No. 4:06CR518-SNL

ORDER

STEPHEN N. LIMBAUGH, Senior United States District Judge.

This case is set for jury trial February 26, 2007. On February 19, 2007 defendant filed motion to dismiss claiming that there has not been a compliance with the Speedy Trial Act, 18 U.S.C. § 3161. The Government has responded in opposition.

This case began with the filing of a criminal complaint and the arrest of the defendant on August 3, 2006. An indictment was returned

August 25, 2006 and trial was set for November 13, 2006.

On September 7, 2006 defendant filed motion for an extension of time in which to file pretrial motions and an extension was granted. It would appear, therefore, that 12 days had run from the date of the indictment to defendant's motion for extension of time. (Trial of a defendant charged in an indictment shall commence within 70 days from the filing date of the indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. 18 U.S.C. § 3161(c)(1).)

On September 25, 2006 defendant filed a waiver of his right to file pretrial motions and after a hearing, the court granted the waiver on October 4, 2006. The time from September 7, 2006 through October 4, 2006 was within the extension of time granted to file pretrial motions, and is excludable. The clock, however, begins to run October 4, 2006.

On November 8, 2006, defendant filed motion to continue the trial date, and on November 9, 2006 the court reset the trial to December 18, 2006. Accordingly, the time from October 4, 2006 to November 9, 2006, which is 35 days, is countable time.

The court did not specify the reasons for the granting of defendant's request for a continuance, but in effect, did so on the basis of the motion. In the motion, defendant stated that "Counsel needs additional time to investigate and prepare this matter for trial. Counsel believes that granting this continuance would outweigh the interests of the

public and defendant [in] a Speedy Trial." This should comport with the requirements of 18 U.S.C. § 3161(h)(8)(A).

During the first week of December 2006, the court met informally, and off the record, with counsel for the Government and the defendant to set up a time for a change of plea, pursuant to a plea bargaining agreement. Although the case was set for trial December 18, 2006, the parties agreed to implement the plea agreement on December 20, 2006. At that time, the parties appeared before the court and the defendant elected not to implement the plea agreement, copy of which had been furnished to the court, in advance, and asked that he have new counsel and that his case be continued for a trial. The defendant and his counsel, at that time, stated to the court that additional time would be needed for a new attorney to be appointed to represent the defendant, and for that attorney to be able to prepare adequately for trial.

Accordingly, by agreement of all of the parties and counsel, the case was reset for jury trial February 26, 2007. New counsel was appointed for the defendant January 3, 2007. Former counsel had been an Assistant Federal Public Defender.

The court believes that the time from November 9, 2006 when the court granted defendant's motion for a continuance for the trial setting to December 18, 2006, to December 20, 2006 when the plea agreement was not implemented should be excludable time for two reasons. First, the time was at defendant's request for a continuance. Second, that period of time involved the completion of a plea agreement and

the consideration of same by the court. *See* 18 U.S.C. § 3161(h)(1)(I).

The time from December 20, 2006 to the present date or to the date when the case has been reset for trial on February 26, 2007 should be excludable as it has resulted from defendant's election not to implement a plea agreement, and his request to the court to have new counsel appointed for him.

On December 20, 2006 it was obvious to the court, although specific findings were not made, that defendant and his counsel, at that time, were not able to resolve their conflicts. Although the court was reluctant to appoint counsel for the defendant at that late date, it appeared unwise not to do so as defendant should have had at least one further opportunity to have counsel of his choice, even at the government's expense. It was therefore obvious to the court that a delay was required in order that the ends of justice could more properly be served in this continuance. To force the defendant to go to trial on a date when a plea was to be implemented, when the defendant elected not to implement the plea agreement and express[ed] severe dissatisfaction with his attorney would, in fact, create serious consequences for the defendant. Granting these continuances obviously outweighed the best interest of the public and the defendant [in] a Speedy Trial.

Accordingly, the court determines that after considering all of the factors in 18 U.S.C. § [3161(h)(8)(B)], the continuances granted on November 9, 2006 and December 20, 2006 outweighed the best interests of the public and the defendant [in] a Speedy Trial.

IT IS THEREFORE ORDERED that defendant's motion to dismiss (# 39) filed February 19, 2007 is DENIED. This case remains set for trial February 26, 2007.

APPENDIX C

[Filed September 5, 2008]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES,
Appellee,

v.

TAYLOR JAMES BLOATE,
Appellant.

Docket No. 07-2357

Appeal from U.S. District Court for the Eastern District of Missouri – St. Louis
(4:06-cr-00518-SNL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Gruender did not participate in the consideration or decision of this matter.

September 05, 2008

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX D

SPEEDY TRIAL ACT
18 U.S.C. § 3161

CURRENT VERSION
EFFECTIVE OCTOBER 13, 2008

Section 3161 of Title 18 of the United States Code provides:

> **(a)** In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.
>
> **(b)** Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.
>
> **(c)(1)** In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days

from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from

the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-

month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> **(1)** Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> > **(A)** delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the

Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of

defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or

failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly

advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before

the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

APPENDIX E

SPEEDY TRIAL ACT
18 U.S.C. § 3161

PRIOR VERSION
EFFECTIVE THROUGH OCTOBER 12, 2008

Until October 13, 2008, section 3161 of Title 18 of the United States Code provided:

> **(a)** In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.
>
> **(b)** Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.
>
> **(c)(1)** In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the

defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying

the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this

chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the

defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining

whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity

of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or

surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

OPPOSITION BRIEF

Supreme Court, U.S.
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No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether time granted at the request of a defendant to prepare pretrial motions qualifies as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), and is thus excludable from the time within which trial must commence under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 534 F.3d 893. The opinion of the district court (Pet. App. 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. A petition for rehearing was denied on September 5, 2008 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on December 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of possessing a firearm following a felony

conviction, in violation of 18 U.S.C. 922(g)(1), and of possessing with the intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. The court of appeals affirmed. Pet. App. 1a-19a.

1. The Speedy Trial Act of 1974 (STA), 18 U.S.C. 3161 *et seq.*, requires a defendant's trial to begin within 70 days of his indictment or appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). Automatically excluded from the computation of the 70-day period are periods of delay "resulting from other proceedings concerning the defendant, including but not limited to * * * delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F).[1] A district court may also exclude from the 70-day limit "[a]ny period of delay resulting from a continuance * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8). Such findings must be made at or before the time the Court rules on a motion to dismiss for an STA violation. *Zedner* v. *United States*, 547 U.S. 489, 507 (2006). If the defendant is not brought to trial within the 70-day period, "the informa-

[1] On October 13, 2008, Congress enacted the Judicial Administration and Technical Amendments Act of 2008 (2008 Act), Pub. L. No. 110-406, 122 Stat. 4291, which makes certain technical changes to the STA. Among other things, the 2008 Act redesignates 18 U.S.C. 3161(h)(1)(F) as 18 U.S.C. 3161(h)(1)(D), and 18 U.S.C. 3161(h)(8) as 18 U.S.C. 3161(h)(7). § 13, 122 Stat. 4294. All citations to the STA in this brief refer to the pre-2008 Act version of the statute, as codified in the 2006 edition of the United States Code.

tion or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal shall be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. On August 2, 2006, police officers saw petitioner and his girlfriend enter a car parked in front of an apartment building suspected of being a site of drug activity. The officers attempted to stop the vehicle after observing petitioner commit several traffic violations. Petitioner pulled to the side of the road but then drove off several times before finally stopping the car. When the officers approached, they saw two bags of crack cocaine in petitioner's lap. After receiving *Miranda* warnings, petitioner repeatedly stated that he was "done" and "going to the penitentiary." Pet. App. 2a.

Petitioner denied any association with the apartment building, but his girlfriend admitted living there and consented to a search. Officers found crack cocaine, three firearms, ammunition, a bulletproof vest, and a rental agreement, identification card, and other documents linking petitioner to the residence. Confronted with the search items, petitioner admitted they were his. Pet. App. 2a-3a.

On August 3, 2006, a criminal complaint was filed, and petitioner made his first appearance before a judicial officer. Pet. App. 20a; Pet. C.A. Br. 7. On August 24, 2006, a grand jury indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1), and one count of possessing with the intent to distribute more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a.

3. At petitioner's arraignment, a magistrate judge entered an order requiring that all pretrial motions be filed on or before September 13, 2006, with the trial to begin on November 13, 2006. See 4:06-cr-518 Docket entry No. 17 (Sept. 1, 2006). On September 7, 2006, an Assistant Federal Public Defender requested additional time for filing pretrial motions because petitioner's assigned counsel was out of the office until September 14. Pet. App. 3a, 21a; Docket entry No. 19, at 1. The magistrate judge extended the motions deadline to September 25, and set a hearing on any pretrial motions or waiver of motions for October 4. Pet. App. 3a; Docket entry No. 20, at 1-2. On September 25, petitioner filed a pleading notifying the court that he wished to waive his right to file pretrial motions. Pet. App. 3a; Docket entry No. 21. At the October 4 hearing, the magistrate judge found petitioner's waiver to be voluntary and intelligent, and he granted petitioner leave to waive the right to file pretrial motions. Pet. App. 3a; Docket entry No. 22; see 10/4/06 Tr. 4.

On November 8, 2006, petitioner moved to reset his trial date, and trial was reset for December 18, 2006. Pet. App. 3a-4a, 21a. In early December, petitioner informed the district court that he wished to plead guilty in accordance with a plea agreement, a copy of which he provided to the court, and the court scheduled the change-of-plea hearing for December 20, 2006. *Id.* at 22a. At the hearing, petitioner changed his mind and requested new counsel and a continuance. *Ibid.* The court granted both of petitioner's requests and reset the trial for February 26, 2007. *Id.* at 4a. Petitioner then sought to file a motion to suppress, but the court, citing petitioner's prior in-court waiver, denied the motion. *Ibid.*

4. On February 19, 2007, petitioner moved to dismiss the indictment for failure to comply with the STA. Pet. App. 4a. The district court denied petitioner's motion. *Id.* at 20a-24a. It concluded that the time period between September 7, 2006, through October 4, 2006, was excludable as "within the extension of time granted to file pretrial motions." *Id.* at 21a. The court also found that the time period from November 9, 2006, through February 26, 2007, was excludable under 18 U.S.C. 3161(h)(8) because the ends of justice served by granting the two trial continuances at petitioner's request outweighed the interest in a speedy trial. The district court therefore concluded that fewer than the 70 days allowable under the STA had elapsed. Pet. App. 21a-23a.

On February 23, 2007, the district court on its own motion continued petitioner's trial to March 5, 2007. Pet. App. 4a. On that same date the government filed a motion in limine regarding the admissibility of evidence under Federal Rule of Evidence 404(b). Docket entry No. 47 (Feb. 23, 2007). The district court granted the motion on the first day of trial. 3/5/2007 Tr. 7-13. After a two-day trial, the jury found petitioner guilty on both counts of the indictment. Pet. App. 4a-5a. Petitioner was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. *Id.* at 1a; Gov't C.A. Br. 1.

5. The court of appeals affirmed. Pet. App. 1a-19a. The court held, *inter alia*, that the district court correctly denied petitioner's motion to dismiss for violation of the STA, because fewer than 70 non-excludable days elapsed between petitioner's indictment on August 24, 2006, and the start of his trial on March 5, 2007. *Id.* at 5a-13a.

The court of appeals first concluded that the 28-day period between September 7, 2006, when the district court granted petitioner's request to extend the deadline for filing pretrial motions, and October 4, 2006, when petitioner formally waived his right to file pretrial motions, was excludable as "delay resulting from other proceedings concerning the defendant" under 18 U.S.C. 3161(h)(1). Pet. App. 6a-8a. Although the court acknowledged that there is a division of authority on the question, see *id.* at 8a, the court agreed with the majority of the courts of appeals that have held that time granted by a district court at a defendant's request for pretrial motion preparation is excludable under that provision, even though pretrial preparation time does not fall within the scope of Section 3161(h)(1)'s specific provision for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F). The court agreed with other courts that "the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through J are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" Pet. App. 7a (quoting *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992)). The court also agreed that "this construction eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." *Ibid.*

The court of appeals also held that the periods between November 9, 2006, and December 18, 2006, and December 20, 2006, and February 23, 2007, were excludable as periods of delay resulting from continuances

granted on the basis of the district court's findings that "the ends of justice served" by the continuances "outweigh[ed] the best interest of the public and the defendant in a speedy trial," 18 U.S.C. 3161(h)(8)(A). Pet. App. 9a-12a. The court declined to decide whether the nine-day period from February 23, 2006, to the start of trial on March 5 was excludable, noting that, "[e]ven if it is not, only 58 days passed between [petitioner's] indictment and trial, fewer than the 70 days allowed by the Speedy Trial Act." *Id.* at 12a.

ARGUMENT

Petitioner contends (Pet. 7-24) that the court of appeals erred in concluding that time granted to a defendant to prepare pretrial motions counts as a "period of delay resulting from other proceedings concerning the defendant" that is excludable from the STA's 70-day time limit under 18 U.S.C. 3161(h)(1). Although the courts of appeals have divided on that question, this Court's review is not warranted to resolve any difference in the courts' approaches. The issue is of limited practical significance, since even those courts that find such time non-excludable under Section 3161(h)(1) will exclude such time under other provisions, and it is unclear that any court would find a violation of the STA based on the facts of this case.

1. As petitioner correctly notes (Pet. 7-13), and as the court of appeals also acknowledged (Pet. App. 7a-8a), the courts of appeals have disagreed on whether time requested by a defendant for preparing pretrial motions is excludable under 18 U.S.C. 3161(h)(1).[2] Eight

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[2] Because petitioner himself requested the extension of the pretrial motions deadline, this case does not present the question whether preparation time granted by a district court *sua sponte* or as part of a stan-

courts of appeals, including the court below, have answered the question in the affirmative. See Pet. App. 7a-8a; *United States* v. *Oberoi*, 547 F.3d 436, 450 (2d Cir. 2008); *United States* v. *Mejia*, 82 F.3d 1032, 1035-1036 (11th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985 *United States* v. *Jodoin*, 672 F.2d 232, 237-238 (1st Cir. 1982) (Breyer, J.).

The majority of courts of appeals, including the court below, have acknowledged that pretrial preparation time does not fall within those categories of excludable pretrial delays that are specifically enumerated in Section 3161(h)(1), such as "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(F). See, *e.g.*, Pet. App. 6a-7a. But because Section 3161(h)(1) provides that excludable delays "includ[e] but [are] not limited to" the specifically enumerated periods of delay, courts have generally held that Section 3161(h)(1)(F) and the other listed exclusions are merely "representative of procedures of which a defendant might legitimately seek to take advantage for the purpose of pursuing his de-

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ding pretrial order, rather than at a defendant's request, is excludable under the STA. See Pet. 12 n.5. Compare *United States* v. *Montoya*, 827 F.2d 143, 153 (7th Cir. 1987) (finding such time excludable), with *United States* v. *Williams*, 197 F.3d 1091, 1094 (11th Cir. 1999) (finding only time specifically requested by defendants for filing motions excludable), and *United States* v. *Hoslett*, 998 F.2d 648, 657 (9th Cir. 1993) (same).

fense," rather than an exhaustive list of allowable exclusions; accordingly, they have excluded pretrial motion time specifically requested for such purposes by the defendant. *Jodoin*, 672 F.2d at 238 (quoting S. Rep. No. 212, 96th Cong., 1st Sess. 10 (1979)); see also *Tibboel*, 753 F.2d at 610 (periods listed in subsections of Section 3161(h)(1) are "illustrative rather than exhaustive"); Pet. App. 7a. Courts have further noted that a contrary construction would lead to the odd result that, while time granted to prepare a *response* to a pretrial motion is excludable under Section 3161(h)(1)(F), since the response necessarily follows the filing of the motion, time granted to prepare the motion itself would not be excludable. See *Oberoi*, 547 F.3d at 450-451 ("We see no reason Congress would accommodate the needs of one party but not the other.").

Disagreeing with the majority approach, the Fourth and Sixth Circuits have concluded that preparation time cannot be excluded under 18 U.S.C. 3161(h)(1). In *United States* v. *Moran*, 998 F.2d 1368 (6th Cir. 1993), the Sixth Circuit reasoned that "[t]he statute expressly excludes only the period 'from the filing of the [pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion,'" but "does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations." *Id.* at 1370-1371 (brackets in original) (quoting 18 U.S.C. 3161(h)(1)(F)); see *United States* v. *Dunbar*, 357 F.3d 582, 595 (6th Cir. 2004) (following *Moran* in case involving stipulated period of delay for preparation of pretrial motions), vacated, 543 U.S. 1099, reinstated in relevant part, 411 F.3d 668, 669 (6th Cir. 2005). In *United States* v. *Jarrell*, 147 F.3d 315, cert. denied, 525 U.S. 954 (1998),

the Fourth Circuit acknowledged that the list of excludable delays in Section 3161(h)(1) is merely illustrative, but similarly concluded that "Congress' decision not to include pretrial motion preparation time within the scope of the delay excludable under § 3161(h)(1)(F) strongly indicates that it did not intend to exclude such time under § 3161(h)(1) at all." *Id.* at 317. The court found support for its conclusion in the legislative history and purposes of the STA.

2. Any disagreement among the courts of appeals with respect to the question presented is, however, of limited significance. Even those courts that have held that a defendant's pretrial motion preparation time is not excludable under Section 3161(h)(1) have made clear that such time is nevertheless subject to exclusion under the "ends of justice" provision of Section 3161(h)(8). See *Dunbar*, 357 F.3d at 595 n.5, 597; *Jarrell*, 147 F.3d at 318; see also *United States* v. *Fields*, 39 F.3d 439, 443-444 & n.3 (3d Cir. 1994) (Alito, J.) (concluding that pretrial motion preparation time granted to defendant was excludable under 18 U.S.C. 3161(h)(8)(A), and reserving the question whether such time would also be excludable under Section 3161(h)(1)). Section 3161(h)(8) requires a district court to consider, among other things, whether failure to grant a continuance "would deny counsel for the defendant * * * the reasonable time necessary for effective preparation," and provides for the exclusion of time granted for that purpose. 18 U.S.C. 3161(h)(8)(B)(iv).

Petitioner cites no case, and we are aware of none, in which a court that follows the minority rule has found a violation of the STA, and thus dismissed an indictment, based on time the defendant himself requested to pre-

pare pretrial motions.[3] The difference between the majority and minority approaches is, in short, not of sufficient importance to warrant this Court's intervention.

3. This case is, in any event, not a suitable vehicle for resolution of the question presented. Even if the period of time granted for petitioner's preparation of pretrial motions counted in full against the 70-day STA time limit, petitioner would not be entitled to dismissal of his indictment.

Petitioner was indicted on August 24, 2006, and time ran for STA purposes until September 7, 2006, when petitioner filed a motion to extend the time to file pretrial motions, for a total of 13 days. Pet. App. 6a. September 7 itself is excluded under Section 3161(h)(1)(F) as a day on which a pretrial motion was filed and promptly disposed of. *Ibid.* Petitioner requested additional time to prepare any pretrial motions, and he received an additional 17 days for that purpose. *Id.* at 3a. Even assuming that the speedy-trial clock ran throughout that period, it stopped on September 25, when petitioner filed a pleading advising the court that he had decided not to raise any issues by pretrial motion. See *ibid.* Although not labeled a pretrial motion, that pleading required a hearing, see Docket entry No. 20, at 2 (Sept. 7, 2006), and served essentially as a motion

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[3] The Sixth Circuit found an STA violation in *Moran* based in part on a delay resulting from schedule for filing pretrial motions set by the district court at the defendant's arraignment. *Moran*, 998 F.2d at 1370; see also *United States* v. *Martinez*, 47 F. Supp. 2d 906, 907, 910-911 (M.D. Tenn. 1999) (finding an STA violation based in part on time allowed under the court's standing discovery order, entered on the day of the defendant's arraignment). A routine scheduling order set by the court *sua sponte* presents a different question from the question presented here, which concerns a period of delay specifically requested by a defendant to prepare pretrial motions. See note 2, *supra*.

for leave to waive the right to file pretrial motions. See *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993) (delay resulting from the filing of the "functional equivalent of a motion" is excludable under Section 3161(h)(1)(F)); accord *United States* v. *Jorge*, 865 F.2d 6, 11-12 (1st Cir.), cert. denied, 490 U.S. 1027 (1989). The STA clock thus stopped again under 18 U.S.C. 3161(h)(1)(F) until the matter was heard by the court on October 4, 2006, the court conducted a colloquy with petitioner, and the court granted him leave to waive his right to file pretrial motions. 10/4/06 Tr. 4. By that date, 30 non-excludable days had passed since petitioner's indictment.

The days between October 5, 2006, and November 8, 2006, the date on which petitioner moved to continue his trial, count against the allowable period, adding another 34 days, for a total of 64. Pet. App. 3a, 8a.[4] The court of appeals found, and petitioner does not here dispute (see Pet. 5 n.3), that the periods from November 9, 2006, to December 18, 2006, and from December 20, 2006, to February 23, 2007, were excludable under Section 3161(h)(8). Pet. App. 9a-12a. That leaves only one non-excludable day, December 19, 2006, for a total of 65 days.

Finally, petitioner did not argue below that the period between February 23, 2007, and March 5, 2007, should count against the 70-day limit, see Pet. C.A. Br. 11-17, and the court of appeals did not decide the question, see Pet. App. 12a. But even if it were appropriate to consider that final period of pretrial delay, that period would be excludable under 18 U.S.C. 3161(h)(1)(F), as the period during which the government's motion in

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[4] The court of appeals counted this period as 35 days, rather than 34. Pet. App. 8a. That discrepancy does not affect the overall calculation.

limine was pending. See p. 5, *supra*; see also, *e.g.*, *United States* v. *Jackson*, 544 F.3d 1176, 1186 n.15 (11th Cir. 2008). The total period of non-excludable delay in this case thus falls within the 70-day period prescribed by the STA.

Because it is not clear that any court would find a violation of the STA based on the facts of this case, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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S. Rep. No. 212, 96th Cong., 1st Sess. (1979) 3, 7

Respondent opposes certiorari but concedes the key factors supporting a grant, while offering only flimsy reasons to ignore them. Respondent concedes that the courts of appeals are deeply divided as to whether pretrial motion preparation time is automatically excludable under 18 U.S.C. § 3161(h)(1). Respondent makes no attempt to explain how § 3161(h)(1)(D)'s *specific* treatment of pretrial motions—excluding only the time from "filing" to "disposition"—can be squared with reading the *general* standard in § 3161(h)(1) to encompass preparation time.[1] Respondent also does not contest that § 3161(h)(1)'s drafters *rejected* a specific proposal to exclude pretrial motion preparation time automatically. Finally, respondent does not dispute that this issue arises virtually daily and is squarely presented here.

Respondent nevertheless suggests that this conflict is "of limited practical significance," Opp. 7, because a *separate* provision of the Speedy Trial Act—18 U.S.C. § 3161(h)(7)'s "ends-of-justice" exclusion—could conceivably apply. Remarkably, however, respondent never even tries to explain how stretching § 3161(h)(7) to exclude automatically pretrial motion preparation time can be squared with the statutory scheme. Respondent's theory would render § 3161(h)(1) superfluous when applied to routine pretrial motions. Respondent's theory also contravenes the unanimous decision in *Zedner* v. *United States*, 547 U.S. 489 (2006), which held that § 3161(h)(7) was "meant to give district judges a

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[1] Respondent has elected to refer to the Act's pre-2008 statutory designations. Opp. 2 n.1. We continue to use the *current* designations. The differences, both parties agree, are inconsequential.

measure of flexibility in accommodating *unusual*, *complex*, and *difficult* cases," but should not be read to "subvert the Act's detailed scheme." *Id.* at 508-509 (emphasis added).

Respondent attempts to manufacture a "vehicle" defect where none exists. Respondent concedes that petitioner is entitled to relief if the pretrial motion preparation time at issue here is not excludable under § 3161(h)(1). Respondent argues, however, that a portion of that time should be excludable because the "functional equivalent" of a motion was pending for several days. This is baseless. Respondent failed to raise this argument in the courts below and, in any event, points to no authority holding that the waiver in question represents the "functional equivalent" of a pretrial motion under § 3161(h)(1).

I. Respondent Concedes That The Courts Of Appeals Are Deeply Divided On The Question Squarely Presented Here

A. Respondent concedes that "the courts of appeals have divided" on the question presented here. Opp. 7. Respondent acknowledges that "the Fourth and Sixth Circuits have concluded that [pretrial motion] preparation time cannot be excluded under 18 U.S.C. 3161(h)(1)" because the specific subparagraph addressing the exclusion of pretrial motion preparation time declares excludable time only from the "filing" of the motion to its "disposition." Opp. 9 (citing *United States* v. *Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993)). Respondent also agrees that "[t]he majority of courts of appeals, including the court below," have reached the opposite conclusion,

Opp. 8, reasoning that preparation time is automatically excludable under § 3161(h)(1) because the list of specifically enumerated exclusions is "'illustrative rather than exhaustive,'" *id.* at 9 (quoting *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985)). This stark conflict warrants this Court's review.

Review is even more essential, however, because—as explained in the petition, Pet. 13-21—the majority rule is so clearly wrong. Respondent does not even attempt to explain how the decision below can be reconciled with § 3161(h)(1)'s plain text and manifest purpose. Most obviously, reading § 3161(h)(1) to render pretrial motion preparation time automatically excludable renders the specific limitation set forth in subparagraph (D) meaningless. Why would Congress have instructed that time relating to pretrial motions be excluded from the "filing" of the motion to the "disposition" of the motion if it intended that such preparation time be automatically excluded under the generic standard in § 3161(h)(1)? Such a reading violates settled canons of interpretation and the structure of the Act. See Pet. 14-18. Tellingly, respondent offers no answer.

Nor does respondent dispute that Congress considered—but *rejected*—a specific proposal to include pretrial motion preparation time within the automatic exclusion of § 3161(h)(1). See Pet. 19-21. The relevant committee indicated that it would be "unreasonable" to exclude "all time consumed by motions practice, from *preparation* through their *disposition*." S. Rep. No. 212, 96th Cong., 1st Sess. 33-34 (1979) (emphasis added). This Court has recognized repeatedly and recently that the Speedy Trial Act's legislative history is a useful interpretive

aid (*e.g.*, *Zedner*, 547 U.S. at 501-502 (2006); *United States* v. *Taylor*, 487 U.S. 326, 334-335, 340 n.11 (1988)), but respondent ignores it.

B. Respondent states that "this case does not present the question whether preparation time granted by a district court *sua sponte* or as part of a standing pretrial order, rather than at a defendant's request, is excludable" under § 3161(h)(1). Opp. 7-8 n.2; see *id.* at 11 n.3. But respondent (correctly) stops short of suggesting that this hypothetical distinction somehow bars review in this case. Even if it matters whether pretrial motion preparation time is *requested* or simply *granted*—and respondent points to no textual reason why it should—respondent concedes that the circuits are squarely divided when the defendant requests it.[2]

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[2] Respondent acknowledges that the Sixth Circuit found a speedy trial violation "based in part on a delay resulting from [a] schedule for filing pretrial motions set by the district court at the defendant's arraignment." Opp. 11 n.3 (citing *Moran*, 998 F.2d at 1370). It then tries to distinguish *Moran* by stating that "[a] routine scheduling order set by the court *sua sponte* presents a different questions from the question presented here." Opp. 11 n.3. That assertion is unexplained, and it is unclear whether the Sixth Circuit considered the time at issue to have been granted *sua sponte* or at least in part at the defendant's request. See *Moran*, 998 F.2d at 1369 ("The [district] court later granted a continuance to allow the defendants to file suppression motions and to avoid scheduling conflicts for Moran's counsel."). The Sixth Circuit never suggested, moreover, that its holding turned on how the time was granted. Rather, the court explicitly rejected the reasoning of courts that had drawn such distinctions. See *id.* at 1370-1371. And in *United States* v. *Dunbar*, 357 F.3d 582 (6th Cir. 2004), vacated, 543 U.S. 1099, reinstated in relevant part, 411 F.3d 668, 669 (6th Cir. 2005), the Sixth Circuit reaffirmed that *Moran* "held that time *requested* to

In any event, the question presented here—"[w]hether time granted to *prepare* pretrial motions is excludable under [18 U.S.C.] § 3161(h)(1)," Pet. i—encompasses either situation. The Court may elect to decide this case on the narrowest grounds possible (*i.e.*, deciding only the issue of time specifically requested by the defendant), but it is within the Court's power to offer more general guidance. Respondent does not suggest otherwise. And such guidance is needed because, as petitioner has explained, Pet. 12 n.5, and respondent concedes, Opp. 7 n.2, those courts that have held that defendant-requested time is excludable under § 3161(h)(1) are divided as to whether time granted *sua sponte* or as part of a scheduling order is likewise excludable. This further conflict underscores the need for certiorari.

II. The Significance Of The Issue Is Not Diminished By The Fact That *Some* Pretrial Motion Preparation Time May Be Excludable Under The Specific Conditions Prescribed By § 3161(h)(7)

Respondent claims that the deep division among the courts of appeals is of "limited significance" because "courts that have held that a defendant's pretrial motion preparation time is not excludable under Section 3161(h)(1) have made clear that such time is nevertheless subject to exclusion under the

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prepare pretrial motions may not be excluded" under § 3161(h)(1). 357 F.3d at 595 (emphasis added). Respondent notes that the request in *Dunbar* was mutual (*i.e.*, by stipulation) rather than unilateral, Opp. 9, but does not suggest that that distinction would make any difference.

'ends of justice' provision of Section 3161(h)[(7)]." Opp. 10. Not so. One glaring defect in respondent's theory that § 3161(h)(7) can be read to require the automatic exclusion of pretrial motion preparation time is that it renders § 3161(h)(1)'s specific treatment of such time superfluous. See *United States* v. *Santos*, 128 S. Ct. 2020, 2028 n.6 (2008) (plurality opinion) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous."). Moreover, respondent's assertion that courts in the Fourth and Sixth Circuits will resort to the ends-of-justice exclusion to exclude routine pretrial motion preparation time is plainly mistaken.

A. First, respondent ignores the elemental differences between § 3161(h)(1) and § 3161(h)(7). Section 3161(h)(1) operates as an *automatic exclusion*. That is, if a period of delay—in this case, time spent preparing pretrial motions—falls under § 3161(h)(1), a district court *must* exclude that time from the speedy trial calculation. See 18 U.S.C. § 3161(h)(1).

By contrast, the ends-of-justice exception set forth in § 3161(h)(7) is far from automatic. Time may be excluded under § 3161(h)(7) *only if* certain "detailed requirements" of the statute are met. *Zedner*, 547 U.S. at 508. Specifically, a district court must find that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). But even that is not enough. The district court must further "set[] forth, in the record of the case, either orally or in writing, its reasons." *Ibid.* And, as respondent acknowledges, "[s]uch findings must be made at or before the time the Court rules on a

motion to dismiss for an STA violation." Opp. 2 (citing *Zedner*, 547 U.S. at 507).

Congress's decision not to allow the automatic exclusion of pretrial motion preparation time—under § 3161(h)(1) ***or*** under § 3161(h)(7)—was a careful one. As the petition explained, automatic exclusion was deemed "unreasonable." Pet. 19 (quoting S. Rep. No. 212, *supra*, at 33-34 (1979)); see also *Jarrell*, 147 F.3d at 318. Instead, Congress decided that such time should be excluded only in certain specific circumstances, chief among them when "failure to grant [the] continuance * * * would * * * make * * * proceeding impossible, or result in a miscarriage of justice," 18 U.S.C. § 3161(h)(7)(B)(i), and when "the case is so unusual or so complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by [the Speedy Trial Act]," *id.* § 3161(h)(7)(B)(ii). Respondent disputes none of this.

Zedner confirms that the ends-of-justice exception is not the panacea respondent claims. In *Zedner*, the Court held that a district court that had issued a continuance in violation of § 3161(h)(7) could not correct its error retrospectively. 547 U.S. at 506-509. In so holding, the Court made clear that district courts may not rely on § 3161(h)(7) as a catch-all to exclude otherwise unexcludable time: "Congress clearly meant to give district judges a measure of flexibility in accommodating *unusual*, *complex*, and *difficult* cases. But it is equally clear that Congress * * * saw a danger that such [ends-of-justice] continuances could get out of hand and *subvert the Act's detailed scheme*." *Id.* at 508-509 (emphasis added). Respondent's claim that courts should evade the constraints of § 3161(h)(1) by resorting to

§ 3161(h)(7) is the sort of subversion unanimously rejected in *Zedner*.

B. Respondent's further claim that there is "no case * * * in which a court that follows the minority rule has found a violation of the STA, and thus dismissed an indictment, based on time the defendant himself requested to prepare pretrial motions," Opp. 10-11, is both beside the point and misleading.

First, the absence of scores of cases in which indictments have been dismissed under the minority rule does not indicate (as respondent claims) that the rule is easily evaded by distorting other provisions of the Speedy Trial Act. Rather, it suggests only that the relevant actors have conformed to the Act. That is, where routine pretrial motion preparation time is not automatically excludable, prosecutors and courts ensure that trials commence on time. The sanction for violating the Speedy Trial Act—*i.e.*, dismissal of the indictment—requires as much.

In any event, respondent's claim that courts will not actually dismiss an indictment on the basis of non-excludable pretrial motion preparation time is ill founded. As previously explained, that assertion rests largely on its reading of the Sixth Circuit's decision in *Moran*. See *supra*, pp. 4-5 n.2. And in respondent's other direct authority, *Jarrell*, the only reason the Fourth Circuit did not dismiss the indictment was because the court *retrospectively* examined whether the ends-of-justice exception could have applied. 147 F.3d at 319. As respondent admits, Opp. 2, this Court has since held that retrospective factfinding under § 3161(h)(7) is forbidden. See *Zedner*, 547 U.S. at 507.

Moreover, if respondent is correct that the Fourth and Sixth Circuits' reading of § 3161(h)(1) can be

avoided by pursuing an ends-of-justice exclusion, then one would expect to see numerous cases from these jurisdictions excluding routine periods of pretrial motion preparation time under § 3161(h)(7). Tellingly, respondent offers no such cases. To the contrary, these courts enforce that provision consistently with the strict limitations that its text requires. *E.g.*, *United States* v. *Pahutski*, No. 3:07cr211, 2008 WL 2372063, at *1 (W.D.N.C. June 6, 2008) (granting a continuance pursuant to § 3161(h)(7) for preparing pre-trial motions in light of the "extensiveness and complexity of * * * the issues); *United States* v. *Alkhallefa*, No. 3:07-CR-165, 2008 WL 703720, at *1 (E.D. Tenn. Mar. 13, 2008) (same in a "complex" case presenting "peculiar circumstances" and a "novel question of law"); *United States* v. *Harden*, 10 F. Supp. 2d 556, 558-559 (D.S.C. 1997) (continuance granted to prepare for trial not excludable under § 3161(h)(7) because request was impermissibly grounded in "general congestion of the court's calendar").

* * *

Respondent's claim that courts need only substitute § 3161(h)(7) for § 3161(h)(1) ignores the careful choice Congress made in enacting these as discrete provisions. Furthermore, respondent does not dispute that the Speedy Trial Act is applied daily throughout the federal courts. Accordingly, the Act's proper interpretation presents a recurring issue of national importance notwithstanding respondent's suggestion that there may be a clever—but legally unsound—way to evade the issue. See Pet. 21–22.

III. There Is No "Vehicle" Problem

It is uncontested that, if the entire time between September 7 and October 4 was not automatically excludable under § 3161(h)(1), then the district court violated the Speedy Trial Act's 70-day limit. Pet. App. 6a-8a. In a final bid to evade review, respondent suggests that this case is "not a suitable vehicle for resolution of the question presented" because a portion of the disputed pretrial motion preparation time could have been excluded anyway. Opp. 11-12. That is simply wishful thinking. Respondent forfeited any such argument by failing to present it to the Eighth Circuit, and, in any event, it is wrong.

Respondent contends that petitioner filed the "functional equivalent" of a pretrial motion on September 25 when he notified the district court of his intention to waive his right to file pretrial motions. Opp. 11-12 (quoting *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993)). Accordingly, respondent claims, the period of "preparation time" terminated, and the 10 days from September 25 to October 4 were time between "filing" and "disposition" of a pretrial motion—excludable under § 3161(h)(1)(D) because the matter was "pending" during that time. *Ibid.*

For starters, respondent never raised this argument in the Eighth Circuit or in the district court. In its brief to the Eighth Circuit, respondent characterized the entire "period from September 7, 2006 through October 4, 2006" as the time "when [petitioner] asked the district court for an extension of time to file pretrial motions." Gov't C.A. Br. 17. Respondent never even hinted that petitioner filed the "functional equivalent" of a pretrial motion on

September 25, terminating preparation time. Nor did respondent make that assertion to the district court. See Gov't Resp. ¶ 4. As this court has long recognized, arguments "not raised" or decided below are "waived" on review. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Accordingly, respondent is mistaken that reversal of the decision below will have no impact on petitioner's case.

What is more, respondent offers scant support for its assertion that the September 25 submission was the "functional equivalent" of a pretrial motion. Respondent avers only that the submission "required a hearing * * * and served essentially as a motion for leave to waive the right to file pretrial motions." Opp 11-12 (citations omitted). And it cites two cases standing only for the general proposition that time between filing and disposition of the functional equivalent of a pretrial motion is excludable under § 3161(h)(1)(D). *Id.* at 12. Neither case establishes, however, that waivers of the right to file pretrial motions are such functional equivalents. By contrast, the functional movant in *Hohn* asked the court to revoke Hohn's pretrial release from jail. 8 F.3d at 1304. Similarly, in *United States* v. *Jorge*, the functional movant filed a discovery request for laboratory reports. 865 F.2d 6, 11 (1st Cir. 1989). Here, petitioner did not "move" the court for any affirmative orders or relief against the respondent. He simply announced his willingness to waive his right to file pretrial motions at the pretrial motions hearing that, as respondent acknowledges (Opp. 4), had already been scheduled. It strains credulity to suggest that any court would treat that as the "functional equivalent" of a pretrial motion, and respondent has identified no decision suggesting otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

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UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 4, 2008

CERTIORARI GRANTED APRIL 20, 2009

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RELEVANT DOCKET ENTRIES

U.S. District Court
Eastern District of Missouri
CRIMINAL DOCKET FOR CASE #:
4:06-cr-00518-SNL

UNITED STATES OF AMERICA

v.

TAYLOR JAMES BLOTE

Date Filed	#	Docket Text
08/03/2006	1	COMPLAINT as to Taylor Bloate (1). (KLK) [4:06-mj-07200-MLM] (Entered: 08/04/2006)
08/03/2006	2	AFFIDAVIT by USA as to Taylor Bloate re: 1 Complaint. (Attachments: # 1 Criminal Cover Sheet) (KLK) [4:06-mj-07200-MLM] (Entered: 08/04/2006)
08/03/2006	5	Minute Entry for proceedings held before Judge Mary Ann L. Medler :Initial Appearance/Rule 5 as to Taylor Bloate held on 8/3/2006[.] Defendant given copy of: complaint. Court to appoint: yes. Pretrial Services bail report received on: 8/3/06. Pretrial [Services] Officer: Deena Siler. Detention Hearing set for 8/4/2006 02:00 PM before Mag Judge Mary Ann L. Medler. Pre-

		liminary Examination set for 8/4/2006 02:00 PM before Mag Judge Mary Ann L. Medler. (Court Reporter or FTR Gold Operator initials: D. O'Leary.) (FTR Gold : yes.) (proceedings started: 3:40.) (proceedings ended: 3:45.) (Defendant Location: custody.) (LAH[]) [4:06-mj-07200-MLM] (Entered: 08/04/2006)
08/24/2006	11	INDICTMENT referred to Magistrate Judge Thomas C. Mummert as to Taylor James Bloate (1) count(s) 1, 2. (Attachments: # Criminal Cover Sheet) (SAJ[]) (Entered: 08/25/2006)
08/24/2006	12	REDACTED INDICTMENT as to Taylor James Bloate (1): Former count 1 is now count 1r. Former count 2 is now count 2r.[] (SAJ[]) (Entered: 08/25/2006)
09/01/2006	16	Minute Entry for proceedings held before Judge Thomas C. Mummert III:Arraignment: Parties present for arraignment. Defendant sworn. Defendant waives reading of indictment, plea of not guilty as to Taylor James Bloate (1) Count 1r,2r held on 9/1/2006 Attorney Felicia

A. Jones for Taylor James Bloate added. Order on pretrial motions issued. Evidentiary Hearing set for 9/20/2006 01:30 PM in Courtroom 13N before Mag Judge Thomas C. Mummert III. Jury Trial set for 11/13/2006 09:00 AM in Courtroom 3N before Honorable Stephen N. Limbaugh. (Court Reporter or FTR Gold Operator initials: jmw) (FTR Gold : yes) (proceedings started: 9:08 a.m.) (proceedings ended: 9:09 a.m.) (Defendant Location: remanded to custody) (JMW) (Entered: 09/01/2006)

09/01/2006 17 ORDER CONCERNING PRETRIAL MOTIONS as to Taylor James Bloate[.] Forthwith each party may propound to opposing party and may file w/the court any request for pretrial disclosure of evidence or information not later than Forthwith. The parties shall respond to any such request for pretrial disclosure not later than 9/5/2006. Counsel for defendant to file with the court a memorandum if defendant chooses not to file any pretrial motions not later than 9/13/2006. Criminal Pretrial Motion due by 9/13/2006. Eviden-

		tiary Hearing set for 9/20/2006 01:30 PM in Courtroom 13N before Mag Judge Thomas C. Mummert III. Jury Trial set for 11/13/2006 09:00 AM in Courtroom 3N before Honorable Stephen N. Limbaugh. Signed by Judge Thomas C. Mummert III on 9/1/2006. (JMW) (Entered: 09/01/2006)
09/07/2006	19	MOTION for Extension of Time To File Pretrial Motions by Taylor James Bloate. (Jones, Felicia) (Entered: 09/07/2006)
09/07/2006	20	AMENDED ORDER CONCERNING PRETRIAL MOTIONS as to Taylor James Bloate, granting motion for Additional Time 19 - Counsel for defendant to file with the court a memorandum if defendant chooses not to file any pretrial motions not later than 9/25/06. Criminal Pretrial Motion due by 9/25/2006. Evidentiary Hearing set for 10/4/2006 10:30 AM in Courtroom 13N before Mag. Judge Thomas C. Mummert III.[] Signed by Judge Thomas C. Mummert III on 9/7/06. (BAK[]) Modified on 9/8/2006 (BAK[]). (Entered: 09/07/2006)

09/25/2006	21	WAIVER of Filing Pretrial Motions by Taylor James Bloate (Flynn, Thomas) (Entered: 09/25/2006)
10/04/2006	22	Minute Entry for proceedings held before Judge Thomas C. Mummert III:Evidentiary Hearing as to Taylor James Bloate held on 10/4/2006. Defendant waives hearing and filing of any pretrial motions. (Court Reporter or FTR Gold Operator initials:B. Crow) (FTR Gold : yes.) (proceedings started: 10:25.) (proceedings ended: 10:30.) (Defendant Location: custody.) (BAK[]) (Entered: 10/04/2006)
11/08/2006	24	MOTION to Continue Trial Date by Taylor James Bloate. FILED UNDER SEAL (KCM[]) (Entered: 11/08/2006)
11/09/2006	25	SCHEDULING ORDER as to Taylor James Bloate; IT IS HEREBY ORDERED that this case is RESET for Jury Trial on 12/18/2006 09:30 AM in Courtroom 3N before Honorable Stephen N. Limbaugh; Signed by Judge Stephen N. Limbaugh on 11/09/2006; (DJO) (Entered: 11/09/2006)

12/20/2006	27	SCHEDULING ORDER as to Taylor James Bloate - Jury Trial set for 2/26/2007 09:30 AM in Courtroom 3N before Honorable Stephen N. Limbaugh. Signed by Judge Stephen N. Limbaugh on 12/20/06. (ARL) (Entered: 12/20/2006)
12/20/2006	28	Minute Entry for proceedings held before Judge Stephen N. Limbaugh: In Court Hearing as to Taylor James Bloate held on 12/20/2006. Trial reset for 2/26/07 at 9:30 a.m. (Court Reporter or FTR Gold Operator initials:Lynne Shrum) (FTR Gold : no.) (proceedings started: 1:45 p.m.[]) (proceedings ended: 1:55 p.m.[]) (Defendant Location: custody.) (LGK[]) (Entered: 12/21/2006)
02/19/2007	39	MOTION to Dismiss on Speedy Trial by Taylor James Bloate. (Welby, Stephen) (Entered: 02/19/2007)
02/20/2007	42	RESPONSE to Motion by USA as to Taylor James Bloate re 39 MOTION to Dismiss on Speedy Trial (Goldsmith, Hal) (Entered: 02/20/2007)

02/21/2007	44	ORDER: IT IS HEREBY ORDERED that Defendant's motion to dismiss 39 filed 2/19/07 is DENIED; This case remains set for trial 2/26/07; denying 39 Motion to Dismiss for Speedy Trial as to Taylor James Bloate (1); Signed by Judge Stephen N. Limbaugh on 2/21/07 (CMA) (Entered: 02/21/2007)
02/23/2007	48	ORDER as to Taylor James Bloate: IT IS HEREBY ORDERED that this case, at the instance of the Court, is RESET for jury trial 3/5/07; Jury Trial reset for 3/5/2007 09:30 AM in Courtroom 3 before Honorable Stephen N. Limbaugh; Signed by Judge Stephen N. Limbaugh on 2/23/07 (CMA) (Entered: 02/23/2007)
03/05/2007	55	Minute Entry for proceedings held before Judge Stephen N. Limbaugh :JURY TRIAL DAY 1: as to Taylor James Bloate; Voir Dire on and jury empaneled 3/5/2007; Taylor James Bloate (1) on Count 1,1r,2,2r; Jury Trial continued until 3/6/2007 09:00 AM in Courtroom 3N before Honorable Stephen N. Limbaugh. (Court Reporter :Lynne

Shrum) (proceedings started: 9:00 a.m.) (proceedings ended: 5:20 p.m.) (Defendant Location: Custody) (ARL) (Entered: 03/07/2007)

03/06/2007	58	JURY VERDICT - See verdict form for details. (KJF[]) (Entered: 03/08/2007)
03/07/2007	56	Minute Entry for proceedings held before Judge Stephen N. Limbaugh:Jury Trial as to Taylor James Bloate held on 3/7/2007 ; Day 2; Evidence concluded; Case submitted to jury; Verdict reached; Defendant found guilty; Sentencing set for 5/17/07 at 11:00 a.m. before the Honorable Stephen N. Limbaugh in Courtroom 3 North; Witness and Exhibit list attached. (Court Reporter: Lynne Shrum) (proceedings started: 9:10 a.m.) (proceedings ended: 6:35 p.m.) (Defendant Location: Custody.) (KJF[]) (Entered: 03/08/2007)
05/23/2007	70	Minute Entry for proceedings held before Judge Stephen N. Limbaugh :Sentencing as to Taylor James Bloate held on 5/23/2007. PSR adopted, accepted and made part of the record under seal. Probation Offi-

		cer present in courtroom. Sentencing held - See judgment. (Court Reporter or FTR Gold Operator initials:Lynne Shrum) (FTR Gold : no.) (proceedings started: 1:54 p.m.[]) (proceedings ended: 2:59 p.m.[]) (Defendant Location: custody.) (LGK[]) (Entered: 05/29/2007)
05/23/2007	71	JUDGMENT as to Taylor James Bloate (1), Count(s) 1r, Deft. was found guilty on Counts I and II of the Two-Count Indictment on 3/6/07. Imprisonment - 360 months on each of the two counts to run concurrently. Recommendations: incarceration as close to Atlanta, GA as possible. Deft. remanded. Supervised release - 8 years. 3 years on Count I and 8 years on Count II to be served concurrently. See judgment for additional supervised release terms. Special assessment of $200 due immediately.[] Signed by Judge Stephen N. Limbaugh on 5/23/07. (LGK[]) (Entered: 05/29/2007)
05/31/2007	72	NOTICE OF APPEAL by Taylor James Bloate re 71 Judgment,[] Filing fee $ 0. (KJF[]) (Entered: 06/01/2007)

07/25/2008	86	OPINION from USCA as to Taylor James Bloate USCA Appeal #: 07-2357 Affirmed. The judgment of the district court is affirmed. (ARL) (Entered: 07/25/2008)
09/05/2008	88	ORDER of USCA (certified copy) as to Taylor James Bloate re 72 Notice of Appeal - Final Judgment USCA Appeal Number: 07-2357 - The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Gruender did not participate in the consideration or decision of this matter. (KJF[]) (Entered: 09/05/2008)
12/08/2008	90	LETTER re: WRIT OF CERTIORARI Issued by US Supreme Court as to Taylor James Bloate re 72 Notice of Appeal - Final Judgment. USCA Appeal Number: 07-2357. The petition for a writ of certiorari in the above entitled case was filed on December 4, 2008 and placed on the docket December 4, [2008] as No. 08-728. (ARL) (Entered: 12/08/2008)

U.S. Court of Appeals
for the Eighth Circuit
CRIMINAL DOCKET FOR CASE #: 07-2357

UNITED STATES

v.

TAYLOR JAMES BLOTE

Date Filed	Docket Text
06/12/2007	CRIMINAL case docketed. [3318809] [07-2357] (PSA)
07/25/2008	OPINION FILED - THE COURT: WILLIAM JAY RILEY, JOHN R. GIBSON and DUANE BENTON. Duane Benton, Authoring Judge (PUBLISHED) [3455106] [07-2357] (PAW)
09/05/2008	JUDGE ORDER:denying [3459810-2] petition for enbanc rehearing filed by Appellant Mr. Taylor James Bloate. Petition for panel rehearing is also denied. Hrg Feb 2008 [3467905] [07-2357] (PAW)

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PETITIONER'S BRIEF

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(5)

Supreme Court, U.S.
FILED
JUN 18 2009
OFFICE OF THE CLERK

No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" (emphasis added). The question presented here is:

> Whether time granted to *prepare* pretrial motions is excludable under § 3161(h)(1).

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OPINIONS BELOW

The decision of the Eighth Circuit (Pet. App. 1a–19a) is reported at 534 F.3d 893. The district court's decision (Pet. App. 20a–24a) is available at 2007 WL 551740.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. J.A. 11. Petitioner timely filed a petition for panel rehearing and rehearing *en banc*, which was denied on September 5, 2008. J.A. 11. On April 20, 2009, this Court granted the petition for a writ of certiorari; it has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3161(c)(1) of Title 18 of the United States Code provides, in pertinent part:

> [T]he trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Section 3161(h) of Title 18 of the United States Code provides, in pertinent part:[1]

> The following periods of delay shall be excluded in computing the time * * * within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.
>
> * * * *
>
> (7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that

---

[1] On October 13, 2008, Congress amended portions of 18 U.S.C. § 3161(h) to repeal obsolete statutory cross-references. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 13, 122 Stat. 4291, 4294 (2008). The amendments made no substantive changes to the statutory provisions at issue here, but several of the relevant subparagraphs were redesignated. As principally relevant here, § 3161(h)(1)**(F)** became § 3161(h)(1)**(D)**, and § 3161(h)**(8)** became § 3161(h)**(7)**. This brief uses the new designations. For clarity's sake, quotations and citations referring to the prior designations have been altered (as indicated with bracketed text) to reflect the new designations. Both versions of the statute are reproduced in the Petition Appendix. Pet. App. 27a–48a.

the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

* * * *

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

* * * *

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would

deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

* * * *

STATEMENT

This case concerns whether time granted to prepare pretrial motions is automatically excluded from the time allotted to bring a criminal case to trial under the Speedy Trial Act, or whether such time is excludable only on a case-by-case basis. The automatic exclusion at issue here is 18 U.S.C. § 3161(h)(1), which excludes delays "resulting from other proceedings concerning the defendant, including but not limited to" certain categories of time enumerated in eight subparagraphs. Subparagraph (D) directly addresses pretrial motions and declares that the time "from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" is automatically excluded. 18 U.S.C. § 3161(h)(1)(D) (emphasis added). The Act separately provides in § 3161(h)(7) for the exclusion of time on a case-by-case basis where the district court finds (upon consideration of specified factors) that the "ends of justice * * * outweigh the best interest of the public

and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A).

The decision below concluded that pretrial motion preparation time—*i.e.*, *before* "the filing of the motion"—is automatically excludable under § 3161(h)(1) notwithstanding the specific treatment of pretrial motions in subparagraph (D). That reading cannot be squared with the plain text of the Act. What is more, the Act's drafters specifically rejected a proposal to exclude pretrial motion preparation time under § 3161(h)(1). And all of that is fully consonant with the Act's structure and purpose, which effectuate defendants' and the public's interests in speedy trials while preserving trial courts' ability to make necessary accommodations on a case-by-case basis under § 3161(h)(7).

A. The Speedy Trial Act

The Speedy Trial Act requires a defendant to be tried within 70 days of indictment or the date on which the defendant first appears in court, whichever is later. 18 U.S.C. § 3161(c)(1). If a defendant is not tried within this 70-day period, the indictment must be dismissed upon his motion. See *id.* § 3162(a)(2).[2]

Not every day between indictment (or first appearance) and trial counts toward the 70-day total; the Act excludes eight categories of time from the

---

[2] The Act leaves to the trial court's (guided) discretion whether to dismiss with or without prejudice. See 18 U.S.C. § 3162(a)(2) (factors include "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice"); *United States* v. *Taylor*, 487 U.S. 326, 333 (1988).

speedy trial calculation. See § 3161(h). This case concerns the first such category, set out in § 3161(h)(1).[3]

Section 3161(h)(1) requires the automatic exclusion of "[a]ny period of delay resulting from other proceedings concerning the defendant, including but not limited to" eight enumerated subcategories of time. *Id.* §§ 3161(h)(1)(A)–(H).[4] One of those subcategories, § 3161(h)(1)(D), specifically addresses pretrial motions. It excludes "delay resulting from any pretrial motion, from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" (emphasis added). This case turns primarily on whether the specifically enumerated period of excludable delay in subparagraph (D) informs what is *not* excludable under § 3161(h)(1). Put another way, the question is whether—notwithstanding Congress's deliberate choice *not* to include pretrial motion preparation

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[3] The other general categories of time excluded under § 3161(h) are delays caused by: (2) deferral of prosecution for the purpose of allowing the defendant to demonstrate his good conduct; (3) the absence or unavailability of the defendant or an essential witness; (4) the fact that the defendant is mentally incompetent or physically unable to stand trial; (5) dismissal and refiling of the information or indictment, from the date the charge was dismissed to the date the time limitation would begin to run as to the subsequent charge had there been no previous charge; (6) the joinder of a defendant for trial with a codefendant as to whom the time for trial has not run; (7) a continuance granted by a judge on the basis of findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial; and (8) obtaining evidence in a foreign country. 18 U.S.C. §§ 3161(h)(2)–(8).

[4] The full text of the current Act is set forth in the Petition Appendix. Pet. App. 27a–37a.

time within subparagraph (D)—such time is nonetheless automatically excluded under § 3161(h)(1)'s general standard.

Time that is not subject to automatic exclusion under § 3161(h)(1) may nevertheless be excluded on a case-by-case basis under § 3161(h)(7), which provides "[m]uch of the Act's flexibility." *Zedner* v. *United States*, 547 U.S. 489, 498 (2006). Subsection (h)(7) permits trial judges to exclude delays resulting from continuances (granted *sua sponte* or at a party's request) if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." § 3161(h)(7)(A). Subsection (h)(7) gives district courts "discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs." *Zedner*, 547 U.S. at 499.

Before excluding delay under subsection (h)(7), however, the district court must consider several factors set forth in § 3161(h)(7)(B). The court may exclude a continuance, for example, if a case is "so unusual or complex * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section." 18 U.S.C. § 3161(h)(7)(B)(ii). Even if a case is not particularly unusual or complex, the court may exclude a continuance if denial of the continuance would "deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." *Id.* § 3161(h)(7)(B)(iv). The (h)(7) exclusion, however, is not available merely "because of general congestion

of the court's calendar, or lack of diligent preparation" by counsel. *Id.* § 3161(h)(7)(C).

B. The District Court's Decision

On August 2, 2006, petitioner Taylor James Bloate was arrested after a traffic stop led to the discovery of two small bags of cocaine in his car. Pet. App. 2a. As part of the ensuing investigation, petitioner's girlfriend, his passenger at the time of his arrest, permitted the police to search her apartment. Pet. App. 2a. There officers found drugs, a bulletproof vest, three firearms, ammunition, and evidence that petitioner lived in the apartment. Pet. App. 2a–3a. On August 24, 2006, petitioner was indicted for possession of a firearm and possession of cocaine with intent to distribute, starting the speedy trial clock. Pet. App. 3a; see 18 U.S.C. § 3161(c)(1).

On February 19, 2007—two weeks before his trial was set to begin—petitioner filed a motion to dismiss the indictment under the Speedy Trial Act. Pet. App. 4a. Although various periods of delay were relevant to that motion and the subsequent appeal, only one remains at issue here. That period began on September 7, 2006, when petitioner moved to extend the deadline for preparation and filing of pretrial motions. Pet. App. 3a. The district court granted the extension that day, moving the deadline to September 25. Pet. App. 3a, 21a. Petitioner later filed a waiver of his right to file pretrial motions, and on October 4, a magistrate judge granted leave for him to waive his right to file the motions. Pet. App. 3a, 21a.

The district court treated the entire 28-day period between September 7 and October 4 as "within the

extension of time granted to file pretrial motions," and excluded it from the speedy trial calculation. Pet. App. 21a. That conclusion brought the total excluded time to 134 days and the total non-excludable time to 58 days.[5] Pet. App. 6a–12a, 21a–24a. Had the district court not excluded the 28 days of pretrial motion preparation time, more than 70 non-excludable days would have elapsed between petitioner's indictment and the trial date, and the indictment would therefore have been dismissed under § 3162(a)(2). Instead, petitioner proceeded to trial, which began on March 5, 2007. He was convicted and sentenced to 360 months' imprisonment. Pet. App. 1a, 4a–5a.

C. The Court of Appeals' Decision

Petitioner appealed his conviction, arguing (among other things) that the district court had erred in excluding the 28 days of pretrial motion preparation time under § 3161(h)(1). The Eighth Circuit affirmed, "holding that pretrial motion preparation time may be excluded under § 3161(h)(1), if the court specifically grants time for that purpose." Pet. App. 8a. The court observed that § 3161(h)(1) offers merely "an illustrative rather than an exhaustive enumeration" of excludable

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[5] The district court excluded 40 days, from November 9, 2006, until December 18, 2006, because the defendant requested a continuance and because a plea agreement had been contemplated during that time, citing 18 U.S.C. § 3161(h)(1)([G]). Pet. App. 9a–11a, 22a–23a. The court excluded the 66 days from December 20, 2006, to February 23, 2007, under § 3161(h)([7]) due to a continuance granted at the request of the defendant to resolve "severe" differences with counsel. Pet. App. 11a–13a, 23a.

delays and concluded that pretrial motion preparation time was properly added to the list. Pet. App. 7a, 8a. It did so at least in part because, in its view, automatically excluding the time "eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." See Pet. App. 7a.

SUMMARY OF ARGUMENT

I.A. The plain text of the Speedy Trial Act directs that pretrial motion preparation time is not automatically excluded under § 3161(h)(1). The Act expressly addresses "delay resulting from any pretrial motion" and specifies that only the time "from the *filing* of the motion through the conclusion of the hearing on, or other prompt *disposition* of, such motion" is within the automatic exclusion. § 3161(h)(1)(D) (emphasis added). Elementary principles of statutory interpretation hold that the specific treatment of pretrial motion delays set forth in subparagraph (D) trumps the general standard of § 3161(h)(1).

Moreover, subparagraph (D) establishes exact limitations on the automatic exclusion of pretrial motion delays, identifying both a starting point and an endpoint. Several of the surrounding subparagraphs, however, offer comparatively open-ended illustrations of excluded time. If Congress had intended for courts to expand the pretrial motion exclusion under the general standard in § 3161(h)(1), it would not have defined the exclusion in subparagraph (D) with such precision.

Indeed, automatically excluding pretrial motion preparation time would render § 3161(h)(1)(D) superfluous. The whole point of subparagraph (D) is to specify that time from the filing of the motion to its disposition is excluded. Excluding preparation time—which, by definition, *precedes* the filing—renders that starting point meaningless. Respecting the plain terms of subparagraph (D), however, does not mean that pretrial motion preparation time can *never* be excluded from the speedy trial calculation. Subsection 3161(h)(7) allows for the exclusion of such time on a case-by-case basis when the ends of justice require it. That provision works in perfect harmony with the specific limitation in subparagraph (D).

Contrary to the Eighth Circuit's assertion, the automatic exclusion of pretrial motion preparation time is not necessary to avoid a "trap for trial judges" faced with a defendant's request for additional preparation time. The district court retains discretion to deny time that is not warranted, and subsection (h)(7) is available on a case-by-case basis to exclude (among other things) "reasonable time necessary for effective preparation." The notion that a defendant could somehow game the system is a red herring.

B. The structure of the Speedy Trial Act confirms that pretrial motion preparation time is not subject to automatic exclusion. If a delay is deemed to fall within § 3161(h)(1), then it is excluded from the speedy trial calculation in every case, without regard to circumstance. Subsection 3161(h)(7), by contrast, brings flexibility to the Act. It ensures that trial courts can accommodate the needs of an individual

case, subject to specific guiding factors set forth in the statute.

Many of the lower courts that have upheld the automatic exclusion of pretrial motion preparation time (including the Eighth Circuit below) have overlooked that essential distinction between (h)(1) and (h)(7), concluding that (h)(1) gives courts "discretion" to exclude such time, or that the exclusion is triggered only when the time is granted in a certain manner. The text of (h)(1) offers no basis for such gradations; rather, the Act contemplates that case-specific considerations should be evaluated under (h)(7)'s ends-of-justice exclusion. Were it otherwise, district courts could circumvent the specific factors and findings upon which the discretion granted in (h)(7) is conditioned.

It is no answer to say that the list of enumerated exclusions in (h)(1) is not exhaustive. That simply begs the question whether a particular delay is subject to automatic exclusion. What is more, Congress left little ground uncovered in § 3161(h). Against that backdrop, it is difficult to believe that that Congress intended to make pretrial motion preparation time—which arises in almost every case—subject to automatic exclusion but simply forgot to say so.

II.A. This is the second occasion on which the government has petitioned for the automatic exclusion of pretrial motion preparation time. When the Speedy Trial Act was amended in 1979 to include the provision at issue here, the Department of Justice submitted a proposal to make pretrial motion preparation time part of the enumerated exclusion that would eventually become subparagraph (D).

That request was specifically considered and explicitly rejected in favor of the current definition. Indeed, the Senate Judiciary Committee concluded that the government's proposal was "unreasonable," principally "because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple." S. Rep. No. 96-212, at 34 (1979). In the face of such unmistakable evidence of congressional intent, the government's renewed bid to make pretrial motion preparation time automatically excludable is as unreasonable today as it was 30 years ago.

And there is still more. At the same time it rejected the government's proposal, Congress clearly indicated that subsection (h)(7) would be the proper vehicle for considering the exclusion of pretrial motion preparation time on a case-by-case basis. In fact, Congress specifically directed that one of the considerations under (h)(7) is whether the delay is "necessary for effective *preparation*." 18 U.S.C. § 3161(h)(7)(B)(iv) (emphasis added).

B. The decision below is also inconsistent with Congress's larger goal to bring precision to the automatic exclusion of delays related to pretrial motions. Congress wanted to expand the scope of that exclusion in response to courts' unduly restrictive interpretations of the indeterminate standard for pretrial motion delays under the original Speedy Trial Act. But Congress was quite deliberate in specifying that it wanted to expand the exclusion only so far and that the limits it set are contained in the text of subparagraph (D).

III. The automatic exclusion of pretrial motion preparation time frustrates the carefully calibrated

legislative judgments Congress made in the Act. The Act serves both the public's and defendants' interests in the prompt adjudication of criminal cases. Of course, speed is not a virtue unto itself; it must be balanced with the practical realities of trial practice. Congress struck that balance by drawing any number of clear lines throughout the Act, while still leaving room for the exercise of (guided) discretion by the courts. The automatic exclusion of pretrial motion preparation time effectively extends the baseline allotment of time for bringing the vast majority of cases to trial, and thereby disrupts the Act's measured scheme.

The decision below and those like it illustrate the danger in giving courts license to relocate the lines that Congress drew. Several lower courts, for example, have suggested that it matters which party requested the pretrial motion preparation time, or that time granted by a routine scheduling order should be treated differently from time specifically granted to prepare pretrial motions. There is no basis in the Act for such hair-splitting. Moreover, this Court has rightly recognized the impracticability of rules that turn on divining who requested what in the fast-moving world of trial courts' dockets.

ARGUMENT

I. Under The Plain Text Of § 3161(h)(1), Pretrial Motion Preparation Time Is Not Automatically Excluded

Section 3161(h)(1)(D) directly addresses delays resulting from pretrial motions, identifying the precise moment at which the exclusion of such time begins and ends. Subparagraph (D) states that only

the time from the "filing" to "the conclusion of the hearing on, or other prompt *disposition*" of the motion should be excluded; time spent preparing the motion—which, by definition, *precedes* the filing—is not excluded. Congress thus spoke with specificity and precision in defining the scope of excludable delays relating to pretrial motions.

The decision below, however, rests on the premise that the careful limits set by subparagraph (D) can be bypassed by creating a new automatic exclusion under the general language of subsection (h)(1). That reading runs counter to basic principles of statutory interpretation; invalidates the deliberate choices Congress made in the Act; and upsets the coherency and consistency of the Speedy Trial Act's scheme.

A. The Only Pretrial Motion Delay Subject To Automatic Exclusion Under § 3161(h)(1) Is Described In § 3161(h)(1)(D)

1. Section 3161(h)(1)'s general language cannot be interpreted in isolation. See *Beecham* v. *United States*, 511 U.S. 368, 372 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences."). In particular, it cannot be interpreted without consideration of the enumerated exclusions that follow it. It is clear from the carefully circumscribed treatment of delays associated with pretrial motions in § 3161(h)(1)(D) that pretrial motion preparation time is not subject to automatic exclusion from the speedy trial calculation.

Subparagraph (D) excludes "delay resulting from any pretrial motion, from the *filing* of the motion

through the conclusion of the hearing on, or other prompt *disposition* of, such motion." § 3161(h)(1)(D) (emphasis added). Congress thus pointedly omitted delays caused by the *preparation* of pretrial motions. As this Court previously has recognized, subparagraph (D) articulates precise starting and stopping points. See *Henderson* v. *United States*, 476 U.S. 321, 326, 327, 329 (1986) ("The plain terms of the statute appear to exclude all time between the filing of and the hearing on a motion * * * ."). As with other features of the Speedy Trial Act, "this omission was a considered one." *Zedner*, 547 U.S. at 500; see also *infra* Part II.

Congress's "specific provision" for the treatment of pretrial motion delays in subparagraph (D) controls over subsection (h)(1), a provision "of more general application." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991) (citing *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)). Under subparagraph (D), a delay caused by a pretrial motion results in an exclusion that begins at the time the motion is *filed*, not before. Having so carefully delineated the point at which delays caused by pretrial motions become excludable, Congress could not have intended for the general terms of (h)(1) to sweep in preparation time. "However inclusive may be the general language" of subsection (h)(1), it must "not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotation marks and citations omitted).

2. The specificity with which subparagraph (D) defines the exclusion of pretrial motion delays was

not inadvertent. When Congress wished to leave the boundaries of an enumerated exclusion less clearly defined, it did so. Subparagraph (A), for example, excludes "delay resulting from any proceeding, *including* any examinations, to determine the mental competency or physical capacity of the defendant." § 3161(h)(1)(A) (emphasis added). With the word "including," Congress indicated that examinations may not be the only kind of competency proceedings that fall within the automatic exclusion of (h)(1)(A).

Similarly, subparagraph (C) excludes "delay resulting from any interlocutory appeal," but contains no further limitation. § 3161(h)(1)(C). The delays contemplated by subparagraph (C) thus have been read to include delay resulting from the filing of petitions for writs of habeas corpus and mandamus that function as interlocutory appeals. See, *e.g.*, *United States* v. *Davenport*, 935 F.2d 1223, 1233 (11th Cir. 1991) ("We hold that the delay resulting [from a petition for writ of habeas corpus filed before trial in the circuit court] is excluded from the petitioner's speedy trial clock under 18 U.S.C. § 3161(h)(1)([C])."); *United States* v. *Tyler*, 878 F.2d 753, 759 (3d Cir. 1989) ("[W]e hold that the 140 days that elapsed between the filing of the mandamus petition and the notification to the district court of the disposition of that petition was 'a period of delay resulting from other proceedings concerning the defendant' within the meaning of 18 U.S.C. § 3161(h)(1)([C]).").

That is not to say that all the other exclusions listed in § 3161(h)(1) are boundless. They are not. Subparagraph (H), for example, limits the excludable period during which courts may keep "any pro-

ceeding concerning the defendant" under advisement to 30 days. See § 3161(h)(1)(H). Under the reasoning adopted below, however, a court could simply decide that day 31 is excludable under § 3161(h)(1) as a "period of delay resulting from other proceedings concerning the defendant." That makes no sense. Nor does it make sense to read subparagraph (D)'s treatment of delays attributable to pretrial motions as inconsequential.

It is therefore clear that, if Congress had wanted pretrial motion preparation time to be excluded automatically, it would have drafted subparagraph (D) differently. See, *e.g.*, *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985) ("Congress knew how to provide for the computation of time periods under the Act relative to the date of an indictment. Had Congress intended that the 30-day trial preparation period * * * commence or recommence on such a date, it would have so provided."). Congress knew how to write broad exclusions; it listed several of them in § 3161(h)(1). Likewise, "Congress clearly knew how to limit an exclusion." *Henderson*, 476 U.S. at 327. Congress chose to limit the automatic exclusion of pretrial motion delay with § 3161(h)(1)(D), and courts may not "override that choice." *Whitfield* v. *United States*, 543 U.S. 209, 217 (2005).

3. As this Court has reaffirmed time and again, "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174

(2001)); see *Inhabitants of Montclair Twp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883). The decision below violates that canon.

Subparagraph (D) restricts the exclusion of pretrial motion delays to those between the *filing* of a motion and its *disposition*. § 3161(h)(1)(D). If preparation time were automatically excluded under the general language of subsection (h)(1), the starting point announced by subparagraph (D) would be meaningless. It would be as if the words "from the filing of the motion" were stricken from the statute. And why stop there? If *pre*-filing delays can fall within § 3161(h)(1)'s general standard, why not *post*-disposition delays? Carried to its logical conclusion, the reasoning adopted below reads subparagraph (D) out of the Act entirely.

To say that preparation time is not *automatically* excluded from the speedy trial calculation is not to say that it may *never* be excluded. Rather, preparation time may be excluded under § 3161(h)(7) at the discretion of the district court when the court determines that the ends of justice served by the excluded delay outweigh the interests of the defendant and society in a speedy trial. See § 3161(h)(7)(A). Most relevant here, "[t]he Act [ ] places broad discretion in the District Court to grant a continuance when necessary to allow further preparation." *Rojas-Contreras*, 474 U.S. at 236; see § 3161(h)(7)(B)(iv). The ability of the district court to exclude pretrial motion preparation time when the circumstances of a particular case demand works in harmony with—rather than negates—the default rule imposed by § 3161(h)(1)(D), under which preparation time is not automatically excluded.

Conversely, the limits on the automatic exclusion imposed by § 3161(h)(1)(D) give effect to significant portions of § 3161(h)(7). If pretrial motion preparation time is a delay that must be excluded under § 3161(h)(1), then, by the Eighth Circuit's logic, so is time granted to prepare for any number of pretrial tasks. If all such pretrial preparation time is automatically excluded under § 3161(h)(1), then § 3161(h)(7)(B)(iv)—which provides for the exclusion of "reasonable time necessary for effective *preparation*" (emphasis added)—is superfluous.

All of that reflects Congress's judgment that a "proceeding" regarding pretrial motions does not begin until—as the text of § 3161(h)(1)(D) prescribes—the motion is actually filed. That understanding is entirely natural in this context. See *Webster's Dictionary of the English Language Unabridged Encyclopedic Edition* 1434 (1979) (defining a legal "proceeding" to mean the "*taking* of legal action") (emphasis added).[6]

4. It is no answer to suggest, as have some courts, that the automatic exclusion of preparation time "eliminates a trap for trial judges, where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." Pet. App. 7a; accord *United States* v. *Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987). There is no trap. If a trial judge is concerned that a defendant has asked

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[6] It is true, of course, that time used by one party to prepare a *response* to a pretrial motion is excluded under § 3161(h)(1)(D) because it falls between the filing of a motion and the motion's disposition, but by that point the "proceeding" has already begun.

for preparation time in an effort to manipulate the speedy trial calculation, the judge can simply deny the request. If such time is genuinely "necessary for effective preparation," the district court can exclude it under § 3161(h)(7) if the appropriate findings are made, § 3161(h)(7)(B)(iv), or such time might qualify for exclusion under one of the other prongs of (h)(7) or another subsection of the Act. As a practical matter, all this Court need do is announce the clear rule that pretrial motion preparation time is not automatically excluded under § 3161(h)(1). District courts and prosecutors will then know that such time presumptively counts against the speedy trial clock and will adjust their behavior accordingly.

In any event, the Act's remedial scheme is flexible. Although the district court is required to dismiss an indictment where the Act has been violated, it may do so with or without prejudice upon consideration of, among other factors, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." § 3162(a)(2). Statutes of limitations are seldom an obstacle when an indictment is dismissed on Speedy Trial Act grounds. See 18 U.S.C. §§ 3288, 3289.

B. The Structure Of The Speedy Trial Act Confirms That Pretrial Motion Preparation Time Is Not Automatically Excluded Under § 3161(h)(1)

Automatic exclusion of pretrial motion preparation time would disrupt the Act's "coherent and consistent" statutory scheme—namely, the

calibrated interplay between § 3161(h)(1) and § 3161(h)(7). See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States* v. *Ron Pair Enterprises*, 489 U.S. 235, 240 (1989)). Preparation time *can* be excluded from the speedy trial calculation, but it should be excluded under § 3161(h)(7) on a case-by-case basis as the ends of justice require, not automatically under § 3161(h)(1).

1. If subsection (h)(7) imparts a standard, (h)(1) imparts a rule. As this Court explained in *Zedner*, 547 U.S. at 507–508, the operative language in (h)(1) is imperative and unequivocal: The periods of delay encompassed by (h)(1) "*shall* be excluded" from the speedy trial calculation in every case. § 3161(h) (emphasis added); see *Henderson*, 476 U.S. at 329–330, 331.

Section 3161(h)(7), by contrast, is the primary source of the Act's flexibility. See *Zedner*, 547 U.S. at 498–499. That provision, which the Act's drafters called "the heart of the speedy trial scheme," S. Rep. No. 96-212, at 10, 19, permits a district court to exclude periods of time—including "reasonable time necessary for effective preparation," § 3161(h)(7)(B)(iv)—if it makes certain findings in the record before deciding a motion to dismiss for violation of Act, see § 3161(h)(7); *Zedner*, 547 U.S. at 507 ("[W]ithout on-the-record findings, there can be no exclusion under § 3161(h)([7]).").

To be sure, both § 3161(h)(7) and the "including but not limited to" clause of § 3161(h)(1) contemplate the possibility that Congress had not specifically anticipated every delay that would merit exclusion from the speedy trial calculation. But those provisions work in opposite ways. Delays excluded

under subsection (h)(7) are case- and circumstance-specific. Delays that qualify for exclusion under subsection (h)(1) must be excluded in every case in which they arise. See *Henderson*, 476 U.S. at 329–330, 331.

Courts that follow the rule adopted below tend to elide that important distinction. In *United States* v. *Wilson*, 835 F.2d 1440 (D.C. Cir. 1987), for example, the defendants requested and received extra time to prepare pretrial motions. The D.C. Circuit upheld the exclusion of that delay, holding that "the trial court may exclude motion preparation time [under § 3161(h)(1)] *in its sound discretion*," especially when the defendant requests the extra time. 835 F.2d at 1444 (emphasis added and citation omitted). Several other courts, including the Eighth Circuit below, have embraced variations on that theme. See *United States* v. *Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008) ("[T]ime for pretrial motions * * * *can* be excluded pursuant to subsection (h)(1), so long as the judge expressly stops the speedy trial clock for that purpose.") (emphasis added); Pet. App. 8a ("[P]retrial motion preparation time *may* be excluded under § 3161(h)(1), if the court specifically grants time for that purpose.") (emphasis added); *United States* v. *Mejia*, 82 F.3d 1032, 1036 (11th Cir. 1996) ("[*U*]*nder the circumstances*, an order granting an extension of time for the preparing and the filing of pre-trial motions causes [an excludable] delay for the purpose of the Speedy Trial Act.") (emphasis added).

But relying on § 3161(h)(1) to accommodate particular circumstances gets the statutory scheme exactly backwards. Subsection (h)(7)—not (h)(1)—is the source of trial courts' discretion. See *Zedner*, 547

U.S. at 498–499. And subsection (h)(7) carries with it carefully prescribed limits on the exercise of that discretion. Indeed, the Act specifically provides that (h)(7) exclusions may not be granted simply "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." § 3161(h)(7)(C). As this Court has recognized, Congress determined that the "substantive openendedness" of subsection (h)(7) should be paired with "procedural strictness" in its application. *Zedner*, 547 U.S. at 508–509. The rule adopted below, however, claims the former but circumvents the latter.

2. If courts should act with deliberation when granting exclusions one case at a time, see *Zedner*, 547 U.S. 508–509, they must be especially wary before granting them a *class* at a time. That is chiefly because delays excluded under subsection (h)(1) can affect a large number of cases in a single a stroke. It is also because evidence suggests that exclusions under (h)(1)'s general standard are quite rare.

In subsection (h)(1), Congress left open the possibility that it had overlooked a class of delay that ought to be automatically excluded, but the wide-ranging list of enumerated exclusions in subparagraphs (A)–(H)—not to mention the remainder of § 3161(h)—leaves little reason to believe that Congress expected significant additions would be necessary. Rather, "the Act's comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are

to be included in the speedy-trial calculation, or as a recognition that the need for such an exclusion will not arise under the statutory scheme." *Rojas-Contreras*, 474 U.S. at 239–240 (Blackmun, J., concurring in the judgment).

Nearly three decades of experience with the Act show that the need has not arisen often. Although there have been cases in which courts have identified further examples of delays that fit within an enumerated subparagraph of (h)(1), the courts of appeals appear to have added almost no new *classes* of exclusions to the (h)(1) list. It would be passing strange if Congress, which was so thorough in its enumeration of exclusions, completely overlooked pretrial motion preparation time, a class of delay likely to occur in almost every criminal case that passes through the courts.

II. Section 3161(h)(1)'s Drafters Specifically Rejected The Automatic Exclusion Of Pretrial Motion Preparation Time

This is not the first time the government has asked to put pretrial motion preparation time within the automatic exclusion in § 3161(h)(1). Its first request was to Congress, which rejected it; its plea to this Court must meet the same fate.

A. Congress Specifically Considered And Rejected The Automatic Exclusion Of Pretrial Motion Preparation Time

Congress added the current language of § 3161(h)(1)(D) to the Speedy Trial Act in 1979. See Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, sec. 4, § 3161(h)(1), 93 Stat. 327, 328 (1979). The original Act, enacted five years before,

had excluded "delay resulting from hearings on pretrial motions." Speedy Trial Act of 1974, Pub. L. No. 93-619, sec. 101, § 3161(h)(1)(E), 88 Stat. 2076, 2077 (1975). That phraseology needed "legislative clarification," S. Rep. No. 96-212, at 20, Congress determined, because it (along with other features of the original statute) had caused "practical problems in interpreting and implementing the act" in the years since its passage, 125 Cong. Rec. 15,454 (1979) (statement of Sen. Biden). Congress set about to remedy that problem in the 1979 amendments.

Congress had been warned that the wording of the 1974 version was too indeterminate to be workable. In a 1971 Senate hearing on the original legislation, Professor Daniel Freed explained that

> [t]he term delay "resulting from hearings on pretrial motions" is ambiguous. It fails to describe the beginning and ending of the excluded period. Does it mean from the date of filing the motion to the date on which the court issues its decisions? That seems excessive. Does it mean "court days actually consumed in hearing a motion"? If so, the language should say that.

Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 92d Cong., 1st Sess. 147–148 (1971) (Appendix A to Prepared Statement of Daniel J. Freed), as reprinted in Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, 99 (Fed. Jud. Center 1980).[7] The

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[7] All bills leading to the passage of the 1974 Act contained the "hearings on pretrial motions" language that was ultimately

Judiciary Committee, however, dismissed a suggestion to clarify the exclusion. Compare Speedy Trial Act of 1973, S. 754, 93d Cong. sec. 101, § 3161(c)(1)(B) (as referred to S. Comm. on the Judiciary, Feb. 5, 1973), with Speedy Trial Act of 1974, S. 754, 93d Cong. sec. 101, § 3161(h)(1)(v) (as referred to H. Comm. on the Judiciary, July 29, 1974). As a result, the precise boundaries of the pretrial motion exclusion remained largely undefined in the final 1974 Act. See sec. 101, § 3161(h)(1), 88 Stat. at 2077–2078.

In 1979, Congress set out to change that. One proposed amendment, sent to Congress by the Department of Justice, called for the exclusion of all "delay resulting from the *preparation* and service of pretrial motions and responses and from hearings thereon." Speedy Trial Act Amendments Act of 1979, H.R. 3630, 96th Cong. sec. 5(c), § 3161(h)(1)(E) (1979) (emphasis added); see 125 Cong. Rec. 7,951 (1979) (statement of Sen. Kennedy introducing the Department of Justice amendment); 125 Cong. Rec. 8,080 (1979) (statement of Rep. Rodino introducing

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enacted. See Pretrial Crime Reduction Act of 1971, H.R. 7107, 92d Cong. § 3161(b)(1) (1971); Speedy Trial Act of 1971, S. 895, 92d Cong. sec. 101, § 3161(c)(1) (1971); Speedy Trial Act of 1973, S. 754, 93d Cong. sec. 101, § 3161(c)(1)(A)(v) (as referred to S. Comm. on the Judiciary, Feb. 5, 1973); Speedy Trial Act of 1974, S. 754, 93d Cong. sec. 101, § 3161(h)(1)(v) (as referred to H. Comm. on the Judiciary, July 29, 1974); Speedy Trial Act of 1974, H.R. 17409, 93d Cong. sec. 101, § 3161(h)(1)(E) (1974); see also Anthony Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, 26 (Fed. Jud. Center 1980) ("The list of examples of 'other proceedings' changed somewhat from one version of the bill to another, although 'hearings on pretrial motions' appeared as an example in all bills through the 1974 act.").

the Department of Justice amendment).[8] That amendment would have required the automatic exclusion of pretrial motion preparation time under § 3161(h)(1)—the very result reached below.

The Senate Judiciary Committee specifically rejected that proposed amendment, instead adopting the current version of § 3161(h)(1)(D). See Speedy Trial Act Amendments Act of 1979, S. 961, 96th Cong. sec. 4, § 3161(h)(1)(F) (as reported June 13, 1979); see also 125 Cong. Rec. 15,452 (1979). The Committee explained that decision in its report:

> Although some witnesses contended that all time consumed by motions practice, from *preparation* through their disposition, should be excluded, *the Committee finds that approach unreasonable.* This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection

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[8] One of the witnesses who appeared before the Senate Judiciary Committee was Assistant Attorney General Philip Heymann. He explained that the Department of Justice's bill would "provide for the exclusion of all time reasonably necessary for and routinely required to *make*, respond to, contest and decide pretrial motions, thus avoiding unnecessary resort to and litigation under and about the exercise of authority under section 3161(h)(3) [sic]." *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. 55 (1979) (Prepared Statement of Assistant Attorney General Philip B. Heymann), as reprinted in Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 110 (noting that the reference to § 3161(h) (3) was likely a misprint that should have referred to § "3161(h)([7])").

> (h)([7])(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts.

S. Rep. No. 96-212, at 33–34 (emphasis added). The House approved the Senate's change, and the bill was enacted into law. See sec. 4, § 3161(h)(1), 93 Stat. at 327–328; see also H.R. Rep. No. 96-390, at 10, as reprinted in 1979 U.S.C.C.A.N. 805, 814 (1979) ("The Committee approves the expansion of this exclusion to 'delay resulting from any pretrial motion, from the filing of the motion, through the conclusion of the hearing on, or other prompt disposition of, such motion' * * * .").

As noted above, even as it rejected the automatic exclusion of preparation time, Congress authorized district courts to exclude preparation time on a case-by-case basis when the ends of justice require. With the same amendments that modified § 3161(h)(1)(D), Congress enacted what is now § 3161(h)(7)(B)(iv), which permits courts to exclude a continuance when denial of the continuance "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective *preparation*." Sec. 5(c), § 3161(h)(8)(B)(iv), 93 Stat. at 328 (emphasis added).

It would be "improper * * * to give a reading to the Act that Congress considered and rejected," *Pacific Gas and Elec. Co.* v. *State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 220 (1983), but that is precisely what affirming the decision below would do. As this Court has explained, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact

statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442–443 (1987) (quoting *Nachman Corp* v. *Pension Benefit Gaur. Corp.*, 446 U.S. 359, 392–393 (1980) (Stewart, J., dissenting)); accord *Doe* v. *Chao*, 540 U.S. 614, 622–623 & n.5 (2004) (relying on the deletion of language from a draft bill when interpreting the enacted language).

That principle has already made its appearance in a case interpreting the Speedy Trial Act. See *Taylor*, 487 U.S. at 339–340 & n.11. In that case, the court of appeals had held (and the government did not dispute) that the defendant's failure to appear for trial did "not restart the full 70-day speedy trial clock." *Id.* at 339–340. The Court noted that a "Department of Justice proposal to restart the 70-day period following recapture of a defendant who has fled prior to trial was rejected by Congress in favor of merely excluding '[a]ny period of delay resulting from the absence or unavailability of the defendant.'" *Id.* at 340 n.11 (alteration in original) (internal citation omitted). This Court should again reject the government's attempt to win from the courts what Congress expressly denied it.

This Court is no stranger to consulting the legislative history of the Speedy Trial Act. See, *e.g.*, *Zedner*, 547 U.S. at 501; *Henderson*, 476 U.S. at 327–328; *Rojas-Contreras*, 474 U.S. at 235–236; *Taylor*, 487 U.S. at 334. And here, that evidence could not be clearer: Congress deliberately elected *not* to include pretrial motion preparation time within the automatic exclusion set forth in § 3161(h)(1). The rule adopted below flouts that decision.

B. Congress Carefully Circumscribed The Pretrial Motion Exclusion, Leaving Preparation-Related Considerations To § 3161(h)(7)

Reading § 3161(h)(1) to exclude pretrial motion preparation time also ignores the fact that Congress wished to bring calibrated precision to the pretrial motion exclusion. One of Congress's chief complaints leading up to the 1979 amendments was that courts had interpreted the Act's exclusions too narrowly. See, *e.g.*, S. Rep. No. 96-212, at 18, 26; H.R. Rep. No. 96-390, at 10. To combat that problem, Congress revised subsection (h)(1)—subparagraph (D) included—with the general goal of expanding the scope of the automatic exclusions listed there. See, *e.g.*, *Henderson*, 476 U.S. at 327–328; S. Rep. No. 96-212, at 33 ("The 'hearings on pretrial motions' provision would be *enlarged* to include, as excludable time, the entire period of time from the date of filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions.") (emphasis added).

Even with the general purpose of expanding § 3161(h)(1)(D), however, Congress was at pains to delineate the provision's limits with precision, identifying both a starting point and an endpoint to pretrial motion delay that would be automatically excluded. See, *e.g.*, S. Rep. No. 96-212, at 34 ("[T]he section provides exclusion of time from filing to the conclusion of hearings on or 'other prompt disposition' of any motion. This later language is intended to provide a point at which time will cease to be excluded * * * ."). The reason for that care is documented in both the House and Senate Judiciary Committee reports: Congress worried that this

exclusion could be abused or, through undisciplined application, expand and undermine the Act's carefully balanced objectives. See *id.* at 33–34; H.R. Rep. No. 96-390, at 10, 11.

It bears repeating that Congress was clear that § 3161(h)(7)—not § 3161(h)(1)—would supply the necessary flexibility to exclude pretrial motion preparation time in appropriate cases. The Senate Judiciary Committee explained that "the language of subparagraph ([D]) of subsection (h)(1), the automatically excludable delay provisions, must be read together with the proposed change in clause (ii) of subsection (h)([7])(B) involving 'preparation' for 'pretrial proceedings." S. Rep. No. 96-212, at 33. Although clause (ii) deals only with unusual or complex cases, the House Judiciary Committee noted that, as part of the 1979 amendments, Congress was also enacting § 3161(h)(7)(B)(iv), which would permit an exclusion "when reasonably necessary to permit either party reasonable time for effective preparation of the case." H.R. Rep. No. 96-390, at 12 (discussing amendments to § 3161(h)(7) designed, in part, to allow for excludable continuances for pretrial preparation, "including, for example, in the preparation of complex pretrial motions").

Accordingly, the limits Congress set on pretrial motion exclusions were not incidental. Rather, they were put into place after specific consideration of both *how much* to expand the existing pretrial motion exclusion and *where else* in the statute to give district courts flexibility. The exclusion of pretrial motion preparation time only under § 3161(h)(7) thus comports with the deliberate judgment of Congress.

III. The Automatic Exclusion Of Pretrial Motion Preparation Time Would Disrupt The Act's Carefully Balanced Scheme

The Speedy Trial Act was expressly intended to serve the interests of both criminal defendants and the public. To effectuate those goals, Congress was forced to make any number of choices. It chose, for instance, to give the government precisely 70 days—not 69 or 71 (or, as the Department of Justice wanted, 120)—to take a case from indictment to trial.[9] See § 3161(c)(1). It chose to give district courts the discretion to exclude particular delays when the ends of justice require. See § 3161(h)(7). And most importantly for this case, it chose automatically to exclude some of the delays occasioned by pretrial motions, but not others. See § 3161(h)(1)(D). By automatically excluding pretrial motion preparation time, the Eighth Circuit replaced

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[9] The 1974 Act required arraignment to follow within ten days of indictment, and trial to commence within 60 days of arraignment. See sec. 101, § 3161(c), 88 Stat. at 2077. In 1979, the Department of Justice, the Judicial Conference of the United States, and the American Bar Association all supported "enlargement of the fixed arraignment to trial period," in part because they felt that the prescribed period was "arbitrary." S. Rep. No. 96-212, at 24. The Senate Judiciary Committee disagreed, concluding that "[t]here is a rational basis for concluding that sixty days is a desirable benchmark for the time by which most criminal cases should proceed to trial." *Ibid.* To eliminate certain "interpretive as well as practical problems," however, the committee consolidated the two, separate periods in the original Act into one, 70-day period. *Ibid.* The Department of Justice and Judicial Conference also favored consolidation, but they supported a 120-day period, not the 70-day period Congress preferred. See Partridge, *Legislative History of Title I of the Speedy Trial Act of 1974*, at 21 & n.61.

Congress's choice with its own, disrupting the careful balance of interests Congress struck in the 1979 Act.

1. The Speedy Trial Act "was designed with the public interest firmly in mind." *Zedner*, 547 U.S. at 500–501 (citing § 3161(h)([7])(A)); accord 125 Cong. Rec. 21,599 (1979) (statement of Rep. Gudger) ("[T]he act is designed to protect society as much as to protect the rights of the accused.").[10] Bringing defendants quickly to trial reduces the number of crimes committed during periods of pretrial release and prevents extended pretrial delay from undermining the deterrent effect of the criminal law. See *Zedner*, 547 U.S. at 501 (citing S. Rep. No. 93-1021, at 6–8 and H.R. Rep. No. 93-1508, at 8). Speedy trials also tend to be more accurate: "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade." *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972). Other evidence may also decay with the passage of time. Automatically extending the speedy trial clock for the preparation of pretrial motions—which occurs in countless cases—presents a serious risk to the public's interest in speedy trials.

At a more basic level, automatically excluding pretrial motion preparation time subordinates the public's interests to the desires of parties or the trial court. As this Court observed in *Zedner*, "there are

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[10] This is not surprising considering that the constitutional right to a speedy trial also takes the public interest into account. That right, this Court has said, is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused" because there is also "a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U.S. 514, 519 (1972).

many cases * * * in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest." 547 U.S. at 502. Because such opting out would "seriously undermine the Act," *Zedner* concluded that "a defendant may not prospectively waive the application of the Act." *Id.* at 502–503. The automatic exclusion of pretrial motion preparation time would likewise allow the court and the parties effectively to opt out of the Act. The trial court would need only designate a delay—whatever its duration, and whatever the reason for it—as "preparation time," and it would be exempt from the strictures of the Act. No less than prospective waivers, such a loophole in the Act's otherwise comprehensive scheme would significantly undermine the Act's pursuit of the public interest. See *id.* at 500.

When pretrial motion preparation time is not excluded automatically, such time must be evaluated on a case-by-case basis and its exclusion justified in on-the-record findings. See § 3161(h)(7)(A). Those findings guide district courts' discretion and allow reviewing courts to determine whether the district court properly took into account the best interest of the public before excluding the delay. See *ibid.* Indeed, there is little indication that Eighth Circuit (or the other courts that share its view) took the public interest seriously into account when deciding that pretrial motion preparation time must automatically be excluded under subsection (h)(1). See, *e.g.*, Pet. App. 7a–8a (focusing on petitioner's request for preparation time without mentioning the public interest); *Wilson*, 835 F.2d at 1444 (same). Excluding pretrial motion preparation time only

under the specific procedures and findings mandated by subsection (h)(7) ensures that the priorities set by Congress are protected.

Defendants' interests in speedy trials are no small matter, of course. The degradation of testimony and evidence frequently impairs defendants' ability to mount an effective defense. See *Barker*, 407 U.S. at 532; Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1898–1899 (2005). The Act also combats the harsh effects of excessive pretrial incarceration, which lies at the "core" of the right to a speedy trial. Brian P. Brooks, *A New Speedy Trial Standard for* Barker *v.* Wingo*: Reviving a Constitutional Remedy in an Age of Statutes*, 61 U. Chi. L. Rev. 587, 596–597 (1994). Even if an accused is not confined before trial, "he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Barker*, 407 U.S. at 533. Legislators also recognized that some prosecutors will "rely upon delay as a tactic in the trial of criminal cases," H.R. Rep. No. 93-1508, at 7 (1974), as reprinted in 1974 U.S.C.C.A.N. 7401, 7408, and the Act seeks to counter such abuses.

2. Under the Sixth Amendment, a defendant's speedy-trial right is "amorphous, slippery, and necessarily relative." *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1290 (2009) (internal quotation marks omitted). Courts evaluating whether delay is of constitutional dimension therefore apply a balancing test that considers the length of the delay, the reason

for it, and the prejudice to the defendant, among other factors. See *ibid.*

Although that sort of "reasonableness review" is appropriate for constitutional speedy trial cases—and, in certain specified ways, for review of exclusions made under § 3161(h)(7)—it is not appropriate where (as here) the task is to determine whether Congress chose automatically to exclude a particular class of delay under § 3161(h)(1). Just two years after this Court articulated the constitutional balancing test in *Barker* v. *Wingo*, Congress passed the Speedy Trial Act, establishing an entirely distinct framework in which to analyze speedy-trial cases—a framework of Congress's choosing, not the courts'. See 125 Cong. Rec. 21,599 (1979) (statement of Rep. Gudger, stating that Congress enacted the Speedy Trial Act "in part in response" to this Court's "refus[al] to read any specific time limits into the sixth amendment"). Accordingly, the Speedy Trial Act's automatic exclusions are not an invitation for courts to substitute their own judgments about what is a reasonable timetable for those of Congress.

What is more, granting courts broad license to expand the Act's automatic exclusions based on judgments about what is reasonable can be a complicated business. In the Seventh Circuit, at least, all preparation time is excluded as long as the trial court specifically grants time for that purpose. See *United States* v. *Montoya*, 827 F.2d 143, 153 (7th Cir. 1987); *cf.* Pet. App. 8a; *Wilson*, 835 F.2d at 1445. Other circuits distinguish between preparation time granted at a defendant's request (excludable) and routine time granted *sua sponte* by the court (non-excludable). See, *e.g.*, *United States* v. *Williams*, 197

F.3d 1091, 1093–1095 (11th Cir. 1999); *United States* v. *Hoslett*, 998 F.2d 648 (9th Cir. 1993). And if those courts were asked to decide whether preparation time would automatically be excluded when the *prosecution* requests it, there may well be differing judgments about what is reasonable in that circumstance, too. As this Court recently observed, determining who requested what in the whirl of daily trial practice is no small feat. See *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2084 (2009) (holding that standard turning on whether defendant affirmatively invoked or requested counsel would be "mysterious" in application); 129 S. Ct. at 2094 (Stevens, J., dissenting) (agreeing that standard would be "unworkable").

The Speedy Trial Act is, by design, an amalgam of bright-line rules and discretionary judgments. But Congress was quite clear in identifying which circumstances warranted the former and which required the latter. To say that Congress could or should have done something differently is beside the point; Congress made those decisions, and they are not subject to judicial second-guessing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S BRIEF

No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether additional time granted at the request of a defendant to prepare pretrial motions qualifies as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1), and is thus excluded from the time within which trial must commence under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*

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H.R. Rep. No. 1508, 93d Cong., 2d Sess. (1974) 14, 26
H.R. Rep. No. 390, 96th Cong., 1st Sess. (1979) 25, 32, 33, 34, 36, 38
S. Rep. No. 1021, 93d Cong., 2d Sess. (1974) 14, 16, 26
S. Rep. No. 212, 96th Cong., 1st Sess. (1979) ..... *passim*
Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* (2007) 24
Speedy Trial Amendments Act of 1979, S. 961, 96th Cong., 1st Sess. (Apr. 10, 1979) *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 & S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) 34
The Speedy Trial Act Amendments of 1979: Hearings on S. 961 & S. 1028 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 34

In the Supreme Court of the United States

No. 08-728

TAYLOR JAMES BLOATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 534 F.3d 893. The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 20a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2008. A petition for rehearing was denied on September 5, 2008 (Pet. App. 25a-26a). The petition for a writ of certiorari was filed on December 4, 2008, and was granted on April 20, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Speedy Trial Act are reprinted in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1), and possessing more than five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 1a, 5a. He was sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. J.A. 9. Petitioner sought reversal of his convictions and dismissal of his indictment under the Speedy Trial Act of 1974 (STA or Act), 18 U.S.C. 3161 *et seq.* The court of appeals rejected that claim and affirmed his convictions, holding that time granted at a defendant's request to prepare pretrial motions is excluded from the STA's deadline for commencing trial as "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1). Pet. App. 1a-19a.[1]

1. The STA generally requires a defendant's trial to begin within 70 days of his indictment or his appearance before a judicial officer, whichever occurs later. 18

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[1] On October 13, 2008, Congress enacted the Judicial Administration and Technical Amendments Act of 2008 (2008 Act), Pub. L. No. 110-406, 122 Stat. 4291, which made certain technical changes to the STA, including renumbering various provisions. Most relevant here, former Section 3161(h)(1)(F) was redesignated Section 3161(h)(1)(D), and former Section 3161(h)(8) was redesignated Section 3161(h)(7). 2008 Act § 13, 122 Stat. 4294. Except where noted, all citations in this brief refer to the current version as it will be codified in the 2008 Supplement to the United States Code.

U.S.C. 3161(c)(1). To provide the flexibility needed to accommodate pretrial proceedings that result in justifiable delay, however, the Act excludes from the 70-day period numerous categories of delay. 18 U.S.C. 3161(h); *Zedner* v. *United States*, 547 U.S. 489, 497 (2006).

Among those exclusions are "period[s] of delay resulting from other proceedings concerning the defendant." 18 U.S.C. 3161(h)(1). The periods of delay covered by that provision "includ[e] but [are] not limited to" eight listed subcategories. *Ibid.* Those subcategories are: delay resulting from proceedings to determine the defendant's mental competency or physical capacity, 18 U.S.C. 3161(h)(1)(A); delay resulting from trial on other charges against the defendant, 18 U.S.C. 3161(h)(1)(B); delay resulting from interlocutory appeals, 18 U.S.C. 3161(h)(1)(C); delay resulting from proceedings to transfer the case or to remove the defendant from another district, 18 U.S.C. 3161(h)(1)(E); delay resulting from orders to transport the defendant from another district or to and from places of examination or hospitalization, 18 U.S.C. 3161(h)(1)(F); delay resulting from the court's consideration of a proposed plea agreement, 18 U.S.C. 3161(h)(1)(G); up to 30 days of delay attributable to time when proceedings concerning the defendant are under advisement, 18 U.S.C. 3161(h)(1)(H); and "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. 3161(h)(1)(D).

The exclusions under Section 3161(h)(1) are "automatic," in the sense that the delays are excluded in every case in which they arise. *Henderson* v. *United States*, 476 U.S. 321, 327 (1986) (citation omitted). The Act also automatically excludes five other categories of

delay, 18 U.S.C. 3161(h)(2)-(6), including, for example, delay resulting from the absence or unavailability of the defendant or an essential witness, 18 U.S.C. 3161(h)(3), and delay resulting from the defendant's mental incompetence or physical inability to stand trial, 18 U.S.C. 3161(h)(4).

In addition, the Act authorizes district court judges to exclude from the 70-day limit "[a]ny period of delay resulting from a continuance * * * if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(7)(A). Findings justifying the continuance must be memorialized at or before the time the court rules on a motion to dismiss for an STA violation. *Zedner*, 547 U.S. at 507.

If the defendant is not brought to trial within the 70-day period, "the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. 3162(a)(2). Dismissal may be with or without prejudice, depending on the district court's weighing of various factors. *Ibid.*; *United States* v. *Taylor*, 487 U.S. 326, 336-337, 342-343 (1988).

2. On August 2, 2006, police officers saw petitioner and his girlfriend enter a car parked in front of an apartment building suspected of being a site of drug activity. After observing petitioner commit several traffic violations, the officers attempted to stop the vehicle. Petitioner pulled to the side of the road but then drove off several times before finally stopping the car. When the officers approached the car, they saw two bags of crack cocaine in petitioner's lap. After receiving *Miranda* warnings, petitioner, who was carrying $1077 in cash, admitted that he knew the crack cocaine was in the

car and repeatedly stated that he was "done" and "going to the penitentiary." Pet. App. 2a-3a; 3/5/07 Tr. 61-62, 109-110.

Petitioner denied any association with the apartment building, but his girlfriend admitted living there and consented to a search of her apartment. Officers found 76 individually wrapped chunks of crack cocaine, three firearms, ammunition, a bulletproof vest, and a rental agreement, identification card, and other documents linking petitioner to the residence. Confronted with the items, petitioner admitted that they were his. In a later interview, petitioner also admitted to buying and reselling approximately four and a half ounces of crack cocaine each week from a supplier in Illinois. Pet. App. 2a-3a; 3/5/07 Tr. 90-91; 3/6/07 Tr. 213-214.

On August 3, 2006, a criminal complaint was filed, and petitioner made his first appearance before a judicial officer. J.A. 1 (4:06-cr-00518 Docket entry No. 5).[2] Assistant Federal Public Defender Thomas Flynn was appointed to represent petitioner. See Docket entry No. 9. On August 24, 2006, a grand jury indicted petitioner on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1), and one count of possessing more than five grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3a; see *id.* at 1a; Pet. C.A. Br. 1. That event started the speedy trial clock. See 18 U.S.C. 3161(c)(1).

3. At petitioner's arraignment, a magistrate judge entered an order requiring that all pretrial motions be filed on or before September 13, with the trial to begin

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[2] All refcrences to docket entries are to entries in the record of the proceedings in the district court.

on November 13. J.A. 3-4 (Docket entry No. 17); see Order Concerning Pretrial Motions 1-2 (Sept. 1, 2006). On September 7, Felicia Jones, a colleague of Flynn who was representing petitioner in Flynn's absence, requested that petitioner be granted additional time for filing pretrial motions because Flynn had been out of the office since the arraignment and was not scheduled to return until September 14. J.A. 4 (Docket entry No. 19); see Defendant's Request for Additional Time to File Pre-Trial Motions (Sept. 7, 2006). The magistrate judge granted the request that day, extending the motions deadline to September 25 and setting a hearing on any pretrial motions or a waiver of motions for October 4. J.A. 4 (Docket entry No. 20); see Amended Order Concerning Pretrial Motions 1-2 (Sept. 7, 2006). On September 25, petitioner filed a pleading notifying the court that he wished to waive his right to file pretrial motions. J.A. 5 (Docket entry No. 21); see Waiver of Pre-Trial Motions. At the October 4 hearing, the magistrate judge questioned petitioner, found his waiver to be voluntary and intelligent, and granted petitioner leave to waive his right to file pretrial motions. J.A. 5 (Docket entry No. 22); 10/4/06 Tr. 2-4.

On November 8, 2006, petitioner moved to reset his trial date, and trial was rescheduled for December 18. Pet. App. 3a-4a; J.A. 5 (Docket entries Nos. 24-25). In early December, petitioner informed the district court that he wished to plead guilty in accordance with a plea agreement, a copy of which he provided to the court, and the court scheduled a change-of-plea hearing for December 20. Pet. App. 22a. At the hearing, petitioner changed his mind and requested new counsel and a continuance of the trial. *Ibid.* The court granted both of petitioner's requests and reset the trial for February 26,

2007. *Id.* at 4a. Petitioner then sought to file a motion to suppress, but the court, citing petitioner's prior in-court waiver of his right to file pretrial motions, denied the motion. *Ibid.*

4. On February 19, 2007, petitioner moved to dismiss the indictment for failure to comply with the STA. Pet. App. 4a. The district court denied the motion, concluding that fewer than the 70 days allowable under the Act had elapsed. *Id.* at 20a-24a. The court determined that the time period between petitioner's indictment on August 24, 2006, and Jones's motion for additional time on September 7, 2006, counted towards the 70-day period. *Id.* at 20a-21a. The court concluded, however, that the time period between September 7 and October 4, 2006, was excluded as "within the extension of time granted to file pretrial motions." *Id.* at 21a. The court also found that the time period from November 9, 2006, through February 26, 2007, was excludable under 18 U.S.C. 3161(h)(7), because the ends of justice served by granting the two trial continuances at petitioner's request outweighed the interest in a speedy trial, and that some of that time was also excluded under 18 U.S.C. 3161(h)(1)(G), because the court had been considering the contemplated plea agreement. Pet. App. 21a-23a.

On February 23, 2007, the district court, on its own motion, continued petitioner's trial to March 5. Pet. App. 4a. On the same day, the government filed a motion in limine on the admissibility of evidence under Federal Rule of Evidence 404(b). Docket entry No. 47. The district court granted the government's motion on March 5, and trial began that day. 3/5/2007 Tr. 7-13. After a two-day trial, the jury found petitioner guilty on both counts of the indictment. Pet. App. 4a-5a. He was

sentenced to 360 months of imprisonment, to be followed by eight years of supervised release. J.A. 9.

5. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-19a. As relevant here, the court held that the district court correctly denied petitioner's motion to dismiss his indictment for violation of the STA, because fewer than 70 non-excludable days elapsed between petitioner's indictment on August 24, 2006, and the start of his trial on March 5, 2007. *Id.* at 5a-13a.

The court of appeals first concluded that the 28-day period between September 7, 2006, when the district court granted petitioner's request for additional time to file pretrial motions, and October 4, 2006, when petitioner formally waived his right to file pretrial motions, was excludable as "delay resulting from other proceedings concerning the defendant" under 18 U.S.C. 3161(h)(1). Pet. App. 6a-8a. The court joined the majority of the federal circuits in holding that additional time granted by a district court at a defendant's request for pretrial motions preparation is excludable under that provision, even though pretrial preparation time does not fall within Section 3161(h)(1)(D)'s specific provision excluding "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." *Ibid.* The court agreed with those other courts of appeals that "the phrase 'including but not limited to' in § 3161(h)(1) indicates that the particular time periods listed in subsections A through [H] are an illustrative rather than an exhaustive enumeration of those delays resulting from 'other proceedings concerning the defendant.'" *Id.* at 7a (quoting *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992)). The court also agreed that "this construction eliminates a trap for trial judges,

where accommodation of a defendant's request for additional time to prepare pretrial motions could cause dismissal of the case under the Speedy Trial Act." *Ibid.*

The court of appeals further held that the periods between November 9 and December 18, 2006, and between December 20, 2006, and February 23, 2007, were excludable as periods of delay resulting from continuances granted on the basis of the district court's findings that "the ends of justice served" by the continuances "outweigh[ed] the best interest of the public and the defendant in a speedy trial," 18 U.S.C. 3161(h)(7)(A). Pet. App. 9a-12a. The court declined to decide whether the nine-day period from February 23, 2006, to the start of trial on March 5 was excludable, noting that, "[e]ven if it is not, only 58 days passed between [petitioner's] indictment and trial, fewer than the 70 days allowed by the Speedy Trial Act." *Id.* at 12a.

SUMMARY OF ARGUMENT

Additional time granted at a defendant's request to prepare pretrial motions is automatically excluded from the Speedy Trial Act's deadline for commencing trial.

A. Additional time granted for preparation of pretrial motions falls under 18 U.S.C. 3161(h)(1), which excludes "delay resulting from other proceedings concerning the defendant." The listed examples of delays excluded by Section 3161(h)(1) indicate that it excludes delays arising from proceedings aimed at advancing the defendant's case towards trial or other resolution, especially procedures of which the defendant might seek to take advantage in pursuing his defense. Courts have concluded that Section 3161(h)(1) excludes numerous delays resulting from unlisted proceedings that are ei-

ther analogous or ancillary to one or more of the listed proceedings.

A district court's grant of a defendant's request for additional motions preparation time is ancillary to pretrial motions themselves, which are one of the specifically listed proceedings. 18 U.S.C. 3161(h)(1)(D). In addition, the delay resulting from the grant of additional time to prepare motions is analogous to delay that is expressly excluded by Section 3161(h)(1)(D). That provision excludes all time from the "filing" of a motion through its hearing or other prompt disposition, including time that the court grants the non-moving party to prepare a response. It would make little sense to exclude the time granted to prepare a response to a motion but not the time granted for the specific purpose of preparing the motion itself.

B. Automatically excluding additional time granted at a defendant's request to prepare and file pretrial motions furthers the purposes of the Speedy Trial Act. Grants of additional preparation time, like the pretrial motions themselves, advance a defendant's case towards trial or other resolution and serve the defendant's interest in pursuing his defense. Additional preparation time facilitates fair and accurate resolution of the motions, which defendants may use to shape the course of trial in their favor or even to obtain dismissal of the charges against them. Neither the defendant nor the public has an interest in rushing to trial when a defendant's attorney has determined that more time is needed to consider whether to file and to prepare pretrial motions, and the district court has considered the issue and agreed.

C. Section 3161(h)(1)(D), which expressly excludes delay resulting from any pretrial motion, beginning with the "filing" of the motion, does not imply that

Section 3161(h)(1) cannot exclude delay resulting from additional time granted to prepare motions. Section 3161(h)(1) expressly states that the delays it excludes "includ[e] but [are] not limited to" the listed examples. It is therefore inappropriate to rely on canons of construction that would draw a negative inference from the examples' failure to expressly address motions preparation time. Nor does reading Section 3161(h)(1) to cover additional motions preparation time granted at a defendant's request render any language in Section 3161(h)(1)(D) superfluous. The language in Section 3161(h)(1)(D) stating that the excluded delay runs from the "filing" of a pretrial motion was added in 1979 to reverse judicial decisions that had limited the excluded delay to the time consumed in judicial hearings on the motion. The current language makes clear that all the time after a motion is filed, not just the hearing time, is excluded. And the language serves that function even though Section 3161(h)(1) excludes motions preparation time granted at a defendant's request.

D. A district court could exclude defense-requested motions preparation time by granting a continuance and making findings under 18 U.S.C. 3161(h)(7) that the "ends of justice served by" the continuance "outweigh the best interest of the public and the defendant in a speedy trial." But automatic exclusion of the time under Section 3161(h)(1) is more consistent with the structure and purposes of the Act. Section 3161(h)(1), like the other automatic exclusions in Section 3161(h)(2) through (h)(6), is designed to exclude delay from frequently recurring situations in which the ends of justice virtually always outweigh the interests of the defendant and society in proceeding more quickly to trial. Section 3161(h)(7), in contrast, is designed to cover more un-

usual situations in which it is important for the district court to make a specific determination whether delay of the trial is warranted. Delay of the trial is virtually always warranted when the district court has decided, based on a defendant's own request, that more time is needed to prepare and to resolve pretrial motions.

E. Excluding the delay at issue here under Section 3161(h)(1) does not undermine the scheme of the Act. The exclusion of additional time granted in response to a defendant's specific request does not extend the 70-day baseline time allotted by the STA for bringing cases to trial. Nor does it allow the courts and the parties to opt out of the Act. Delay may be excluded only if the court has granted a case-specific extension for the specific purpose of preparing pretrial motions (or preparing for another pretrial proceeding listed in Section 3161(h)(1)). That rule has been followed in numerous circuits for more than two decades without any evidence that it has led to abuse.

F. The legislative history is consistent with that approach. Although the Senate Judiciary Committee rejected exclusion under Section 3161(h)(1) of *all* time *routinely allotted* for motions preparation, the Committee did not address whether to exclude the narrower subset of additional preparation time granted at a defendant's specific request. The Committee's opposition to the exclusion of all motions preparation time in every case does not shed light on how it would have resolved that different question. Nor does the legislative history indicate that Congress intended any exclusion for additional motions preparation time to be accommodated under Section 3161(h)(7)'s ends-of-justice provision rather than Section 3161(h)(1). Because the legislative history does not address the specific question at issue here, the

Court should adhere to the interpretation of Section 3161(h)(1) adopted by the court below, which is supported by the text, structure, and purposes of the Speedy Trial Act.

ARGUMENT

ADDITIONAL TIME GRANTED AT A DEFENDANT'S REQUEST TO PREPARE PRETRIAL MOTIONS IS EXCLUDED UNDER 18 U.S.C. 3161(h)(1) FROM THE SPEEDY TRIAL ACT'S DEADLINE FOR COMMENCING TRIAL

Petitioner argues that the delay in his trial that resulted from the additional time to prepare and file motions that the district court provided at his request violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, and requires reversal of his convictions and dismissal of his indictment. The court of appeals rejected that argument, holding that time granted at a defendant's request to prepare pretrial motions is automatically excluded from the STA's deadline for commencing trial. That holding—which has been reached by eight courts of appeals—correctly reflects the text, purposes, and structure of the Act.[3]

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[3] See Pet. App. 5a-13a; *United States* v. *Oberoi*, 547 F.3d 436, 448-451 (2d Cir. 2008), petition for cert. pending, No. 08-1264 (filed Apr. 14, 2009); *United States* v. *Mejia*, 82 F.3d 1032, 1035-1036 (11th Cir.), cert. denied, 519 U.S. 872 (1996); *United States* v. *Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 912-915 (10th Cir.) (per curiam), opinion supplemented on other grounds on reh'g, 881 F.2d 866 (10th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1043 (1990); *United States* v. *Wilson*, 835 F.2d 1440, 1444-1445 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985) (Posner, J.); *United States* v. *Jodoin*, 672 F.2d 232, 237-238 (1st Cir. 1982) (Breyer, J.). Only two circuits have taken a contrary position. See *United States* v. *Dunbar*, 357 F.3d 582, 595 (6th Cir. 2004) (holding that Section

A. Time Granted At A Defendant's Request To File Pretrial Motions Falls Within Section 3161(h)(1)'s Exclusion Of "Delay Resulting From Other Proceedings Concerning The Defendant"

The STA seeks to promote speedy criminal trials without sacrificing time needed for pretrial proceedings that help ensure the accuracy and fairness of the trials. See *Zedner* v. *United States*, 547 U.S. 489, 497 (2006); S. Rep. No. 212, 96th Cong., 1st Sess. 19-20, 26 (1979); S. Rep. No. 1021, 93d Cong., 2d Sess. 3, 21 (1974); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 2, 15, 21 (1974). To that end, the Act generally requires every criminal trial to begin within 70 days of the indictment or the defendant's initial appearance, 18 U.S.C. 3161(c)(1), but also excludes numerous periods of delay from that 70-day period. See *Zedner*, 547 U.S. at 497. In particular, the Act lists several frequently recurring categories of delay that are automatically excluded whenever they occur in a particular case. 18 U.S.C. 3161(h)(1)-(6). One category is "delay resulting from other proceedings concerning the defendant." 18 U.S.C. 3161(h)(1). As the court below held, that category encompasses the delay at issue in this case.

1. Section 3161(h)(1) contains several subparagraphs that provide an illustrative list of "delay[s] resulting from other proceedings concerning the defendant." 18 U.S.C. 3161(h)(1)(A)-(H). At the same time, Section 3161(h)(1) makes clear that this list is not intended to be

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3161(h)(1) did not exclude motions preparation time to which the parties had agreed by stipulation); *United States* v. *Jarrell*, 147 F.3d 315, 316-319 (4th Cir.) (rejecting STA claim but stating that defense-requested motions preparation time is not excluded under Section 3161(h)(1)), cert. denied, 525 U.S. 954 (1998).

comprehensive, stating that the excluded delays "includ[e] but [are] not limited to" the listed examples. 18 U.S.C. 3161(h)(1).

Although the examples are not intended to be exhaustive, they provide guidance on the kinds of "delay[s] resulting from other proceedings concerning the defendant" that Section 3161(h)(1) excludes. Under the interpretative canons of *noscitur a sociis* and *ejusdem generis*, when general words are accompanied by specific words in a statutory enumeration, the general words are often construed to embrace only objects similar in nature to the objects enumerated by the specific words. See *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003); *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000).

Here, the listed examples indicate that Section 3161(h)(1) excludes delays arising from proceedings aimed at advancing the defendant's case towards trial or other resolution (or at resolving other charges against him). See, *e.g.*, 18 U.S.C. 3161(h)(1)(A) (excluding delay from "examinations" to determine the defendant's mental competency or physical capacity); 18 U.S.C. 3161(h)(1)(B) (excluding delay from "trial with respect to other charges against the defendant"); 18 U.S.C. 3161(h)(1)(D) (excluding delay from "any pretrial motion"); 18 U.S.C. 3161(h)(1)(F) (excluding delay from "an order directing [the] transportation" of the defendant from another district or to and from places of examination or hospitalization); 18 U.S.C. 3161(h)(1)(G) (excluding delay from "consideration by the court of a proposed plea agreement"). At the core of the listed proceedings are procedures, such as competency examinations and pretrial motions, "of which a defendant might l[e]gitimately seek to take advantage for the pur-

poses of pursuing his defense." S. Rep. No. 212, *supra*, at 10 (quoting S. Rep. No. 1021, *supra*, at 36).

Courts have identified numerous delays that are excluded by Section 3161(h)(1) because they arise from unlisted proceedings that share these characteristics. Those unlisted proceedings generally fall into two categories—proceedings analogous to listed proceedings and proceedings ancillary to listed proceedings.

Thus, courts have excluded delays resulting from proceedings—such as petitions by pretrial services officers to revoke pretrial release, requests for reconsideration of pretrial orders, and requests for discovery—that are the "functional equivalent" of pretrial motions, which are expressly covered by Section 3161(h)(1)(D). *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993); *United States* v. *Noone*, 913 F.2d 20, 27 n.12 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); *United States* v. *Jorge*, 865 F.2d 6, 11-12 (1st Cir.), cert. denied, 490 U.S. 1027 (1989). Courts have likewise excluded delays stemming from proceedings, such as writs of habeas corpus and petitions for mandamus, that are "analogous" to interlocutory appeals, which are expressly covered by Section 3161(h)(1)(C). *United States* v. *Davenport*, 935 F.2d 1223, 1233 (11th Cir. 1991); *United States* v. *Tyler*, 878 F.2d 753, 757 (3d Cir.), cert. denied, 493 U.S. 899 (1989). And courts have excluded delays arising from many other proceedings that the courts have found "similar to" listed proceedings. *United States* v. *Lucky*, 569 F.3d 101, 107 (2d Cir. 2009) (status conferences); *United States* v. *Salgado*, 250 F.3d 438, 454 n.2 (6th Cir.) (pretrial hearings and initial appearances), cert. denied, 534 U.S. 916, and 534 U.S. 936 (2001); *United States* v. *Garrett*, 720 F.2d 705, 710 (D.C. Cir. 1983) (bail revocation proceedings), cert. denied, 465 U.S. 1037 (1984);

United States v. *Lopez-Espindola*, 632 F.2d 107, 110-111 (9th Cir. 1980) (probation revocation proceedings on other charges).[4]

Courts have also excluded delays resulting from unenumerated proceedings that are ancillary to a listed proceeding. Thus, courts have excluded delays during plea negotiations, even though the express exclusion in Section 3161(h)(1)(G) "does not apply until the proposed plea agreement is finalized and submitted to the court." *United States* v. *Van Someren*, 118 F.3d 1214, 1218 (8th Cir. 1997); *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987). Similarly, courts have excluded delays arising from pretrial proceedings on other charges against the defendant, such as pretrial detention or plea negotiations, which are ancillary to "trial with respect to other charges against the defendant," 18 U.S.C. 3161(h)(1)(B). *United States* v. *Leftenant*, 341 F.3d 338, 344-345 (4th Cir. 2003), cert. denied, 540 U.S. 1166 (2004); *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987); *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir.), cert. denied, 446 U.S. 986 (1980).

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[4] Although courts have sometimes cited particular subparagraphs of Section 3161(h)(1) when excluding delays resulting from analogous proceedings, the courts' reasoning makes clear that they have found the proceedings covered under Section 3161(h)(1)'s general language. See, *e.g.*, *Davenport*, 935 F.2d at 1233 ("We hold that the petition for a writ of habeas corpus * * * is an 'other proceeding' analogous to an interlocutory appeal."); *Tyler*, 878 F.2d at 757 (agreeing with the district court that "a petition for writ of mandamus is excludable as 'another proceeding concerning the defendant,' analogous to an interlocutory appeal"); *Jorge*, 865 F.2d at 11-12 ("Even if the government's 'Request [for discovery]' is not a motion, it is sufficiently analogous to a motion to be considered at least an 'other proceeding' covered by the same section of the Speedy Trial Act.").

See also *United States* v. *Pete*, 525 F.3d 844, 849-850 (9th Cir.) (excluding delay resulting from a certiorari petition following an interlocutory appeal, stating that a certiorari petition "undoubtedly comes within § 3161(h)(1)'s catchall language," and, although it is not an appeal, "it is certainly part of the appellate process"), cert. denied, 129 S. Ct. 298 (2008); *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004) (excluding time during which the defendant was considering whether to file a motion for appointed counsel), vacated on other grounds, 543 U.S. 1099 (2005).[5]

2. Delay arising from a district court's grant of a defendant's request for additional time to prepare pretrial motions is one of the delays resulting from ancillary proceedings that are excluded by Section 3161(h)(1). That additional time is ancillary to pretrial motions themselves, which are one of the specifically listed proceedings. 18 U.S.C. 3161(h)(1)(D). The additional time for motions preparation "is directly related to," and facilitates, the motions proceeding (or the defendant's considered decision not to invoke that proceeding). *United States* v. *Jodoin*, 672 F.2d 232, 238 (1st Cir.) (Breyer, J.). Without sufficient time to determine whether to file and to prepare pretrial motions, a defendant may be unable to file a motion by the deadline, have to submit an inadequate filing, or make an uninformed decision about whether to file. Adequate preparation time is thus essential to the fair and accurate resolution of pretrial

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[5] The numerous examples of exclusions under Section 3161(h)(1)'s general language contradict petitioner's contention that "exclusions under (h)(1)'s general standard are quite rare." Br. 24. On the contrary, exclusions under those general provisions are essential in enabling courts to comply with the STA's time limit.

motions, which, as Section 3161(h)(1)(D) indicates, warrants delay of the trial.

The delay resulting from the grant of a defendant's request for more time to prepare pretrial motions is also analogous to delay that is expressly excluded by Section 3161(h)(1)(D). In excluding all time "from the filing of the [pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion," 18 U.S.C. 3161(h)(1)(D), that provision excludes the time that the court grants the non-moving party to prepare a response. See *Henderson* v. *United States*, 476 U.S. 321, 330 (1986). It makes scant sense to exclude the time granted to prepare a response to a motion but not time granted for the specific purpose of preparing the motion. "The same interests and considerations that militate in favor of allocating time for a party to respond to a motion (and the court to decide it) justify the allocation of time to prepare the motion in the first place." *United States* v. *Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008), petition for cert. pending, No. 08-1264 (filed Apr. 14, 2009).

This Court relied on similar reasoning in *Henderson* in holding that Section 3161(h)(1)(D) excludes time after the hearing on a pretrial motion but before the court receives all the submissions necessary to decide the motion. The Court explained that "[i]t would not have been sensible for Congress to exclude automatically all the time prior to the hearing on a motion and 30 days after the motion is taken under advisement, but not the time during which the court remains unable to rule because it is awaiting the submission by counsel of additional materials." *Henderson*, 476 U.S. at 331. Likewise, it would not have been sensible for Congress to exclude automatically time granted to respond to a motion but

not time granted for the express purpose of preparing it. Thus, delay resulting from time granted to a defendant to prepare pretrial motions is "delay resulting from other proceedings concerning the defendant," excluded by Section 3161(h)(1).[6]

B. Excluding Additional Time Granted At A Defendant's Request To File Pretrial Motions Furthers The Purposes Of The Speedy Trial Act

Interpreting Section 3161(h)(1) to exclude additional time for filing pretrial motions granted at a defendant's request furthers the purposes of that provision and the Speedy Trial Act as a whole. As discussed above, Section 3161(h)(1) is designed to exclude delay arising from proceedings that advance the defendant's case towards trial or other resolution, particularly procedures of which the defendant might legitimately take advantage to pursue his defense. See *United States* v. *Mobile Materials, Inc.*, 871 F.2d 902, 913 (10th Cir.) (per curiam), opinion supplemented on other grounds on reh'g, 881

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[6] Consistent with *United States* v. *Williams*, 197 F.3d 1091, 1093-1095 (11th Cir. 1999), *United States* v. *Hoslett*, 998 F.2d 648, 654-657 (9th Cir. 1993), and the STA's legislative history, see pp. 29-30, 33-35, *infra*; but see *Montoya*, 827 F.2d at 152-153 the court below did not interpret Section 3161(h)(1) to exclude from the speedy trial clock the routine time for filing pretrial motions allotted by the standard scheduling order that was entered at petitioner's arraignment. See Pet. App. 6a. The court interpreted the provision to exclude only the additional preparation time granted in response to petitioner's specific request for more time to file motions. See *id.* at 6a-8a. That interpretation follows from the listed examples, which indicate that Section 3161(h)(1) only excludes delay from *individualized* "proceedings concerning the defendant." Time granted by a local rule or a routine order entered at the outset of every case does not result from that kind of individualized proceeding.

F.2d 866 (10th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1043 (1990); *Jodoin*, 672 F.2d at 238. Grants of additional time to explore whether to file and to prepare pretrial motions, like pretrial motions themselves, serve those goals.

Pretrial motions—such as motions to suppress evidence or to dismiss the indictment—advance the case towards resolution because they shape the content or structure of the trial and may even eliminate the need for trial altogether. The same is true of additional time granted at a defendant's request to research, prepare, and file pretrial motions. Motions cannot be resolved fairly and accurately if a defendant has insufficient time to prepare them. And if the additional time leads a defendant to conclude that he should not file any motions, that result too promotes efficient resolution of the case.

Neither the defendant nor the public is well-served by rushing to trial when a defendant's attorney needs more time to consider or to prepare pretrial motions, and the district court has evaluated the issue and concurred. Defense counsel is "best acquainted with the defensive strategy opposing the government's case" and is thus best situated to determine whether the defendant's interest in additional time to prepare potential pretrial motions outweighs his interest in proceeding more quickly to trial. *Mobile Materials, Inc.*, 871 F.2d at 914. And the district court's concurrence in that determination, after the opportunity for an adversary presentation, shows that the public interest is also served by delaying trial.

C. The Express Exclusion Of Delay From Pretrial Motions Does Not Prevent The Exclusion Under Section 3161(h)(1) Of Delay From Additional Preparation Time

Petitioner does not dispute that "Section 3161(h)(1)'s general language," by its own terms, excludes delay resulting from the grant of a defendant's request for additional time to prepare pretrial motions. Br. 15. Instead, relying on various canons of statutory construction, petitioner argues that Section 3161(h)(1) cannot be given its ordinary meaning because "Section 3161(h)(1)(D) directly addresses delays resulting from pretrial motions," and it excludes only time beginning with the "filing" of the motion. *Id.* at 14-15; see *id.* at 16 (arguing that Section 3161(h)(1)(D) "controls over subsection (h)(1)"). That argument is mistaken.

1. Section 3161(h)(1)(D) does not address delay from the preparation of pretrial motions that occurs before pretrial motions are filed. But that omission hardly signifies that Congress intended to occupy the field of motions practice—and to preclude by implication the recognition of other proceedings connected to motions practice that produce excludable delay under Section 3161(h)(1). The language of the statute itself refutes any such negative implications: When listing examples of excludable delay in Section 3161(h)(1), Congress introduced the examples by the phrase "including but not limited to." 18 U.S.C. 3161(h)(1). Petitioner's use of the examples to preclude coverage of ancillary or analogous proceedings that generate delay attributes to the examples a limiting function that Congress cannot have intended. As Justice Frankfurter explained long ago, "[t]o attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application." *Phelps Dodge Corp.*

v. *NLRB*, 313 U.S. 177, 189 (1941) (declining to draw the negative implication, from Congress's grant of remedial authority to an agency "including *reinstatement* of employees," that the agency could not order the remedial *hiring* of employees) (emphasis added). The failure of Congress to expressly address delay from motions preparation in Section 3161(h)(1)(D) (or the other subparagraphs of Section 3161(h)(1)) thus does not indicate whether the delay is covered by Section 3161(h)(1)'s general language.

2. The canons of construction that petitioner invokes to support his contention are also not applicable here. Petitioner first relies on the canon that a "specific" statutory provision "controls over" a "more general" one. Br. 16 (quoting *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991)). But, as the cases cited by petitioner illustrate, that canon comes into play only when a court must reconcile conflicting statutes or two independent provisions of a single statute. See *Gozlon-Peretz*, 498 U.S. at 406-407; *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). Here, the specific provision, Section 3161(h)(1)(D), is a subparagraph of the more general provision, Section 3161(h)(1), and is intended to illustrate, but not to exhaust, the scope of the general provision. In that situation, the canon does not apply because "there is no conflict" between the two provisions. *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 336 (2002).

Petitioner also argues (Br. 16-18) that Congress's express delineation of starting and ending points for the delay excludable under Section 3161(h)(1)(D) implies that Congress did not intend for Section 3161(h)(1) to

exclude periods of delay outside those boundaries. See *id.* at 24-25 (arguing that the "comprehensive list of express exclusions counsels one to read Congress' failure to exclude certain periods of time as a considered judgment that those periods are to be included in the speedy-trial calculation") (quoting *United States* v. *Rojas-Contreras*, 474 U.S. 231, 239-240 (1985) (Blackmun, J., concurring in the judgment))). That argument—that "expressing one item of [an] associated group or series excludes another left unmentioned"—is an application of the canon *expressio unius est exclusio alterius*. *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 (2002) (citation omitted; brackets in original). But, as discussed above, Congress's use of the phrase "including but not limited to" makes clear that Section 3161(h)(1)'s "general words are intended to include other matters besides such as are specifically mentioned" in its subparagraphs. *Ford* v. *United States*, 273 U.S. 593, 612 (1927) (citation omitted). Accordingly, the *expressio unius* canon does not apply here. See *Echazabal*, 536 U.S. at 80 (rejecting *expressio unius* canon where statute used the phrase "may include"); Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47:23, at 417 (2007) (noting that it is generally improper to apply *expressio unius* where a statute uses the word "include").[7]

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[7] The inapplicability of *expressio unius* and the canon that specific provisions control over conflicting general provisions does not mean that the examples in Section 3161(h)(1) play no role in the interpretation of its general language. On the contrary, as discussed above, the examples inform the scope of the general language under the principles of *ejusdem generis* and *noscitur a sociis*. And, for the reasons discussed above, application of those principles supports the conclusion that Section 3161(h)(1) excludes delay

The final canon invoked by petitioner (Br. 18-19) is that statutes should not be interpreted in a manner that renders any of their provisions superfluous. That canon too is not relevant here. Petitioner contends that, if time granted at a defendant's request to prepare pretrial motions is automatically excluded under the general language of Section 3161(h)(1), then the language in Section 3161(h)(1)(D) stating that the excludable delay from a pretrial motion begins with the filing of the motion "would be meaningless." *Id.* at 19. But as petitioner himself acknowledges, Congress enacted the language in Section 3161(h)(1)(D) in 1979 to expand the previous exclusion for delay resulting from "hearings on pretrial motions," 18 U.S.C. 3161(h)(1)(E) (1976), to include "the entire period of time from the date of filing" through the hearings on or other disposition of the motions. Pet. Br. 31 (quoting S. Rep. No. 212, *supra*, at 33). By explicitly stating that the excludable delay begins with "the filing of the motion," 18 U.S.C. 3161(h)(1)(D), the new language "avoid[s] an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing." H.R. Rep. No. 390, 96th Cong., 1st Sess. 11 (1979). The language continues to serve that function even though Section 3161(h)(1) excludes time granted at a defendant's request to prepare pretrial motions.

D. The Availability Of An "Ends of Justice" Continuance Does Not Undermine The Exclusion Under Section 3161(h)(1) Of Additional Motions Preparation Time

A district court could, as petitioner notes (Br. 19), exclude defense-requested motions preparation time

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resulting from the grant of a defendant's request for additional time to prepare pretrial motions. See pp. 14-20, *supra*.

from the speedy trial clock by granting a continuance of the trial and making findings under 18 U.S.C. 3161(h)(7) that the "ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Automatic exclusion of the time under Section 3161(h)(1) is, however, more consistent with the structure and purposes of the STA.

1. The exclusion in Section 3161(h)(1), like those in Section 3161(h)(2) through (h)(6), is designed to cover frequently recurring situations in which the ends of justice served by the delay will virtually always outweigh the interests of the defendant and society in proceeding more quickly to trial. Delay from additional time granted at a defendant's request to file pretrial motions should be excluded under Section 3161(h)(1) because, as discussed above, the defendant and society will almost never have an interest in going to trial without adequate time to prepare and to resolve pretrial motions. Section 3161(h)(7), in contrast, is designed to cover more unusual situations in which it is important for the district court to make a specific finding that delay of the trial is warranted. See S. Rep. No. 212, *supra*, at 9, 10-11; S. Rep. No. 1021, *supra*, at 21; H.R. Rep. No. 1508, *supra*, at 21-22.

2. Petitioner is mistaken in contending that excluding additional motions preparation time under Section 3161(h)(1) will "disrupt * * * the calibrated interplay between § 3161(h)(1) and § 3161(h)(7)" (Br. 21-22) by allowing "circumvent[ion]" of Section 3161(h)(7)'s "carefully prescribed limits" (*id.* at 24). On the contrary, no valid purpose is served by requiring district courts to make ends-of-justice findings when those findings are inherent in the grant of additional time to prepare motions.

The time and effort devoted to making explicit ends-of-justice findings would waste limited judicial resources and contribute to court congestion and delay. Even more problematic, if courts were required to undertake an ends-of-justice balancing before granting and excluding defense-requested time to prepare motions, some judges might inappropriately deny the requested time. At least in the early years of the STA, many judges were "loathe to grant 'ends of justice' continuances to permit adequate preparation time." S. Rep. No. 212, *supra*, at 26. Thus, relegating time needed for pretrial motions preparation to coverage under Section 3161(h)(7) would create a risk that courts would hasten cases to trial, without adequate opportunity for accurate resolution of pretrial motions that would have enhanced the fairness of the trial or obviated the need for trial altogether.

Another potential danger is that a court might grant the request for additional time but neglect to make the Section 3161(h)(7) findings, enabling the defendant later to seek dismissal of the indictment under the STA. In that circumstance, the defendant's STA claim would virtually always be a purely technical one, as is petitioner's claim here. Petitioner nowhere argues that it was not in the interests of justice for the district court to grant him additional time to allow his originally assigned attorney to review his case and decide what motions needed to be filed. Petitioner's only real dispute concerns under which provision of the STA, Section 3161(h)(1) or Section 3161(h)(7), the time should have been excluded. Reversing criminal convictions and dismissing indictments on such technicalities, even if the dismissals were without prejudice to reindictment and retrial, would frustrate, rather than advance, the public's interest in speedy trials. Cf. *Vermont* v. *Brillon*, 129 S. Ct. 1283,

1287 (2009) (holding that "delays sought by counsel are ordinarily attributable to the defendants they represent" and cannot violate the constitutional right to a speedy trial). And this approach would provide defendants with an opportunity to game the system. Cf. *United States* v. *Fields*, 39 F.3d 439, 443 (3d Cir. 1994) (Alito, J.) ("The defendant's arguments are disturbing because he would have us order the dismissal of his indictment based on continuances that his own attorney sought."). The STA "was not, after all, meant to provide defendants with tactics for ensnaring the courts into situations where charges will have to be dismissed on technicalities." *United States* v. *Bufalino*, 683 F.2d 639, 646 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983).

Petitioner claims that adopting his position would not risk dismissals based on technical STA violations because, if this Court holds that Section 3161(h)(7) findings are required, district courts "will adjust their behavior accordingly." Br. 21. But the busy and fast-paced nature of trial practice means that even careful district court judges will make mistakes. The STA should not be construed to provide defendants with a windfall when such inevitable mistakes occur.

3. Petitioner also errs in contending (Br. 20) that interpreting Section 3161(h)(1) to exclude additional time granted to prepare pretrial motions would render superfluous Section 3161(h)(7)(B)(iv). That provision permits district courts to grant an ends-of-justice continuance, in a case that as a whole is not unusual or complex, to provide the parties "reasonable time necessary for effective preparation." 18 U.S.C. 3161(h)(7)(B)(iv). Contrary to petitioner's assertion, the provision retains an important function even if additional time granted to prepare pretrial motions is automatically excluded un-

der Section 3161(h)(1). Although Section 3161(h)(1) excludes time granted to prepare for listed pretrial proceedings or other ancillary or analogous pretrial proceedings, it does not exclude time used to prepare for trial itself—*e.g.*, to interview witnesses, prepare exhibits, or obtain documents. That type of delay is excludable only if a court makes an ends-of-justice finding in accordance with Section 3161(h)(7)(B)(iv).[8]

E. Excluding Additional Motions Preparation Time Under Section 3161(h)(1) Does Not Undermine The Scheme Of The Act

Petitioner is also incorrect that excluding the delay at issue here under Section 3161(h)(1) "disrupts the Act's measured scheme" because it "effectively extends the baseline allotment of time for bringing the vast majority of cases to trial." Br. 14; see *id.* at 34. Although Section 3161(h)(1) excludes additional motions preparation time granted in response to a defendant's specific request, the court in this case appropriately did not rely on Section 3161(h)(1) to exclude the routine preparation time that is allotted by local rule or by a scheduling order entered by a district court as a matter of general practice. See note 6, *supra*. "An across-the-board exclusion for pretrial motion preparation that is based merely upon the entry of a standard scheduling order would sacrifice the [Act's] goal" of achieving speedy trials "without necessarily advancing the [Act's further]

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[8] Requiring an ends-of-justice finding for the exclusion of delay attributable to general trial preparation also furthers the STA's goal of achieving speedy trials. Because almost everything counsel does in advance of trial can be viewed as general trial preparation, automatic exclusion of that time would permit a significant extension of the Act's 70-day limit in virtually every case.

goal" of allowing "effective pretrial preparation." *United States* v. *Hoslett*, 998 F.2d 648, 656 (9th Cir. 1993). "Under such a rule defendants would be subject to an automatic extension of the seventy day statutory period in every case, whether or not they intended to file any motions or required any unusual grant of time for pretrial preparation." *Ibid.*; see also *United States* v. *Williams*, 197 F.3d 1091, 1095 n.6 (11th Cir. 1999) ("If the customary time allowances for the filing of motions resulted in excludable time, each judicial district, in effect, would be free to amend the Speedy Trial Act by local rule."). But interpreting Section 3161(h)(1) to exclude additional motions preparation time granted at a defendant's specific request, as the court below did here, does not extend "the baseline allotment of time" under the Act.

Petitioner is likewise mistaken in contending that automatically excluding motions preparation time granted at a defendant's request would, like the prospective waiver of the STA that this Court held unauthorized in *Zedner*, "allow the court and the parties effectively to opt out of the Act." Br. 35. The open-ended, prospective waiver at issue in *Zedner* was not authorized by the text of the STA and would have overridden all of the exclusions delineated in the Act. Here, in contrast, excluding the specific period of time requested by the defendant for the purpose of preparing pretrial motions falls within the STA's express exclusion for "delay resulting from other proceedings concerning the defendant," 18 U.S.C. 3161(h)(1).

Petitioner's contention that excluding the delay at issue here would allow evasion of the Act is based on the false premise that "[t]he trial court would need only designate a delay—whatever its duration, and whatever the

reason for it—as 'preparation time,' and it would be exempt from the strictures of the Act." Br. 35. Contrary to that assertion, the delay is excluded only if the court grants further time for the specific purpose of preparing pretrial motions (or preparing for another listed pretrial proceeding) based on a determination that additional time is needed in the defendant's specific case. Petitioner points to no evidence suggesting that defendants have been seeking, or courts have been granting, abusively long periods to prepare pretrial motions in order to circumvent the requirements of the STA. The absence of any evidence of abuse is telling since eight courts of appeals follow the rule that motions preparation time granted at the defendant's request is excluded under Section 3161(h)(1). And, in several circuits, that rule has been in place for more than two decades. See *Mobile Materials, Inc.*, 871 F.2d at 912-915 (10th Cir. 1989); *United States* v. *Wilson*, 835 F.2d 1440, 1444-1445 (D.C. Cir. 1987); *United States* v. *Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985) (Posner, J.); *Jodoin*, 672 F.2d at 237-238 (1st Cir. 1982).

This Court rejected a loophole argument quite similar to the one petitioner advances in *Henderson*, 476 U.S. at 330, when the Court held that Section 3161(h)(1)(D) excludes all time between the filing of a motion and the conclusion of the hearing on the motion. As the dissent in *Henderson* noted, under the Court's interpretation, a trial judge could delay the hearing on pretrial motions for any reason—including his "decision to play golf"—without violating the STA. *Id.* at 334 (White, J., dissenting). And, because the Court also interpreted Section 3161(h)(1)(D) to exclude all time after the hearing until the district court receives all the submissions it needs to decide the motion, *id.* at 330-331,

the court and the parties could theoretically evade the STA's time limit further by delaying the date for post-hearing submissions, see *id.* at 334 (White, J., dissenting). The Court nonetheless rejected those risks as a reason to constrain the time allowed by the STA for resolving pretrial motions. Just as the district courts and parties can be trusted to police themselves against the potential for abuse inherent in Section 3161(h)(1)(D), so too they can be trusted to refrain from abusing Section 3161(h)(1), interpreted to exclude time granted at the defendant's request to prepare pretrial motions.

Finally, the STA includes specific provisions to deter potential abuses. For example, if a court determines that an attorney has, solely for the purpose of delay, knowingly requested time not necessary for the preparation of pretrial motions, the court may impose a fine, report the attorney for disciplinary proceedings, or deny him the right to practice before the court for up to ninety days. See 18 U.S.C. 3162(b). In addition, courts have the authority to augment these explicit statutory remedies. When it enacted the STA, Congress directed the district courts to study the problem of court congestion and to implement speedy trial plans. 18 U.S.C. 3165. District courts were directed to impose "time limits, procedural techniques, innovations, systems or other methods" to expedite the disposition of criminal cases. 18 U.S.C. 3166(a). The judicial councils of each circuit were also encouraged to promulgate guidelines to effectuate the STA's purposes. 18 U.S.C. 3166(f). Congress thus "clearly envisioned" that the courts could set "guidelines, rules, or procedures relating to motions practice" to curb any abuses. *Henderson*, 476 U.S. at 328 (quoting H.R. Rep. No. 390, *supra*, at 10). Reliance on these remedies and procedures, rather than dismissal

of indictments on a technicality, would best advance the goals of the Act.

F. The Legislative History Does Not Support Petitioner's Reading Of The Act

1. Petitioner argues (Br. 25-32) that the legislative history of the 1979 amendments to the STA indicates that Congress rejected an exclusion under Section 3161(h)(1) for the type of delay at issue here. Petitioner misinterprets the legislative history.[9]

Following the STA's enactment in 1974, many courts read its exclusions narrowly, which resulted in numerous determinations that cases were not being tried within the mandated time limits. S. Rep. No. 212, *supra*, at 18-19; H.R. Rep. No. 390, *supra*, at 4. In 1979, in response to the problems with the Act's initial implementation, the Department of Justice and the Judicial Conference of the United States requested Congress to make various amendments. *Ibid.*; S. Rep. No. 212, *supra*, at 15. One area of particular concern was the express exclusion of all "delay resulting from hearings on pretrial motions," 18 U.S.C. 3161(h)(1)(E) (1976), which some courts had given a "restrictive interpretation * * * as extending only to the actual time consumed in

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[9] As the Court has recognized, the Act's legislative history, although comprehensive, is often contradictory and unhelpful. See *Henderson*, 476 U.S. at 329-330 (rejecting a portion of S. Rep. No. 212 as "at odds with the plain language of the statute" and "contrary to other passages contained in both the House and Senate Reports"); *United States* v. *Taylor*, 487 U.S. 326, 335 n.8 (1988) (finding portions of the STA's legislative history "largely unhelpful"); see also *Rojas-Contreras*, 474 U.S. at 237 (Blackmun, J., concurring in the judgment) (finding legislative history unhelpful); *Zedner*, 547 U.S. at 509-510 (Scalia, J., concurring in judgment) (criticizing use of legislative history in interpreting the STA).

a pretrial hearing." H.R. Rep. No. 390, *supra*, at 11. The Department of Justice proposed amending Section 3161(h)(1)(E) to provide for the exclusion of "delay resulting from the preparation and service of pretrial motions and responses and from hearings thereon." See Speedy Trial Amendments Act of 1979, S. 961, § 5(c), 96th Cong., 1st Sess. (Apr. 10, 1979) (as introduced) *reprinted in The Speedy Trial Act Amendments of 1979: Hearings on S. 961 & S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 6 (1979) (*Senate Hearings*). As Assistant Attorney General Philip B. Heymann explained, this amendment was intended to "provide for the exclusion of *all time* reasonably necessary and *routinely* required to make * * * pretrial motions." *Senate Hearings* 55 (emphasis added). The Senate Judiciary Committee Report criticized the Justice Department's proposal for excluding "all time consumed by motions practice." S. Rep. No. 212, *supra*, at 33-34. The Committee found that approach unreasonable, stating that "in routine cases, preparation time should not be excluded." *Id.* at 34.[10]

The Senate Report thus expressed opposition to the automatic exclusion of *all* time *routinely allotted* for

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[10] One of the Committee's concerns about excluding preparation time for pretrial motions was that "it will be quite difficult to determine a point at which preparation time actually begins." S. Rep. No. 212, *supra*, at 34. That concern is valid when a routine deadline for filing pretrial motions is set by local rule or standard order. But the concern disappears when the only time that is excluded is preparation time specifically granted in response to a defendant's representation that additional preparation time is needed. See *Mobile Materials, Inc.*, 871 F.2d at 914 ("Routine drafting of a motion, unknown to the court until the document is filed, simply does not toll the speedy trial period. Either the trial judge accedes to a specific request for preparation or the trial date moves inexorably closer.").

motions preparation. But neither the Justice Department bill nor any other bill or amendment proposed excluding the narrower subset of additional motions preparation time granted by the district court at the defendant's specific request. The Committee never considered that option, and its comments rejecting a separate, broader proposal shed no light on how it would have viewed the question. See, *e.g.*, *Kimbrough* v. *United States*, 128 S. Ct. 558, 572 (2007) (reasoning that Congress's explicit rejection of 1-to-1 sentencing ratio for crack vs. powder cocaine did not imply a rejection of any deviation from the 100-to-1 ratio specified in the Sentencing Guidelines); *Rapanos* v. *United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (declining to draw any inference from Congress's failure to enact proposed legislation where Congress did not consider the "*precise* issue" before the Court) (citation omitted).

2. Petitioner also errs in arguing (Br. 29, 32) that the legislative history shows that Congress intended any exclusion for pretrial motions preparation time to be accommodated under Section 3161(h)(7), rather than Section 3161(h)(1). The Committee Reports did suggest that additional time needed for preparation for pretrial proceedings in complex cases—including, among other things, additional time needed for preparation of pretrial motions in those cases—could be excluded under Section 3161(h)(7)(B)(ii). See S. Rep. No. 212, *supra*, at 33-34 (citing the "proposed change in clause (ii) of subsection (h)([7])(B) involving 'preparation' for 'pretrial proceedings'" and noting that the proposed amendments would permit "reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts"); *id.* at 34 ("Subsection (a) amends clause (ii) of existing section 3161(h)([7])(B) to address, in part,

the preparation time problem regarding pretrial motions, discussed above."); H.R. Rep. No. 390, *supra*, at 12 (noting that amendments would "[r]evise language relating to the grant of continuances based on the complexity or unusual nature of a case to clarify that such continuances can be granted on the basis of delays in preparation of the case in all phases of the case, including, for example, in the preparation of complex pretrial motions"). But the Reports did not address defense requests for additional time to prepare pretrial motions in non-complex cases, which raise a narrower set of issues in a different context.

Complex cases often involve "protracted" pretrial proceedings. Committee on the Admin. of the Crim. Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended*, 106 F.R.D. 271, 302 (1984) (*STA Guidelines*). Those pretrial proceedings may include not just "complex pretrial motions," H.R. Rep. No. 390, *supra*, at 12, but also "extensive discovery based on complex transactions," S. Rep. No. 212, *supra*, at 34, and other proceedings, including "a whole series of pretrial conferences," *STA Guidelines*, 106 F.R.D. at 302, designed to resolve disputes over expert witnesses, trial exhibits, jury instructions, and the like. Thus, in a complex case, the district court may wish to establish a comprehensive schedule for pretrial proceedings, including but not limited to pretrial motions, and the court could utilize Section 3161(h)(7)(B)(ii) to accommodate the delay associated with that schedule. But Section 3161(h)(7)(B)(ii) addresses complex cases only; it does not address the situation here, where case-specific factors in a non-complex case justify the grant of additional preparation time particularly for pretrial motions.

Petitioner implies (Br. 29) that the legislative history indicates that Congress intended courts to use Section 3161(h)(7)(B)(iv) to exclude delay associated with additional preparation time for pretrial motions in non-complex cases. But the legislative history of Section 3161(h)(7)(B)(iv) refers only to time for preparation for *trial*. See S. Rep. No. 212, *supra*, at 35 (noting that the amendment adding Section 3161(h)(7)(B)(iv) "provides the court a basis for a continuance when, after due diligence on the part of counsel for either party, there is simply not enough time to effectively prepare for *trial*") (emphasis added). The legislative history is silent on which provision of the STA most appropriately accommodates grants of additional motions preparation time in non-complex cases. And courts have relied on both Section 3161(h)(7)(B)(iv) and Section 3161(h)(1) to exclude those delays. Compare, *e.g.*, *Fields*, 39 F.3d at 444 (excluding delay under Section 3161(h)(7)(B)(iv)), with cases cited in note 3, *supra* (excluding delay under Section 3161(h)(1)).

3. Other portions of the Committee Reports forcefully disapproved of narrow and inflexible interpretations of the automatic exclusion provisions akin to the interpretation that petitioner proposes here. The Senate Report criticized government actors for interpreting the originally enacted STA "in an unnecessarily inflexible manner," noting that, in many cases, "allowable excludable time had not been computed or had been computed improperly." S. Rep. No. 212, *supra*, at 18; see *id.* at 21 (criticizing "the general reluctance of courts to interpret the exclusions flexibly"); *id.* at 26 (criticizing "judicial unwillingness to interpret the Act's exclusions flexibly to date"); *ibid.* (criticizing courts for "construing] automatically excludable delays with too much in-

flexibility"). The House Report likewise complained that "provisions of the [A]ct were not being fully implemented" and noted that "[t]his was particularly true of" the automatic exclusions. H.R. Rep. No. 390, *supra*, at 5; see *id.* at 3 (noting the "[n]umerous flexible exclusions of time" in the Act); *id.* at 11 (criticizing the "unduly restrictive interpretation of the exclusion" concerning pretrial motions).

The Senate Report explained that one reason for automatically excluding delay arising from other "proceedings concerning the defendant" was that "it would indeed be anomalous to permit the defendant to benefit from delay proper[l]y undertaken to protect his interests in a fair adjudication of the charges against him by allowing dismissal without exclusion of that time." S. Rep. No. 212, *supra*, at 9. Yet that is precisely what petitioner seeks to do here. The district court properly granted petitioner additional time so that his counsel could protect his interests in a fair trial by investigating the propriety of filing pretrial motions. Petitioner now asks this Court to hold that this period of time, extended at his urging and solely for his benefit, was improperly excluded. The Court should refuse that request.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2009

APPENDIX

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

CURRENT VERSION
EFFECTIVE OCTOBER 13, 2008

1. Section 3161(h) of Title 18 of the United States Code provides in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are un-

known and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the

court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

SPEEDY TRIAL ACT
18 U.S.C. § 3161(h)

PRIOR VERSION
EFFECTIVE THROUGH OCTOBER 12, 2008

2. Until October 13, 2008, Section 3161(h) of Title 18 of the United States Code provided in pertinent part:

Time limits and exclusions

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom

the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(9) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

REPLY BRIEF

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No. 08-728

In the Supreme Court of the United States

TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief, we explained why delay caused by the preparation of pretrial motions is not automatically excluded from the speedy trial calculation under 18 U.S.C. § 3161(h)(1). Congress specifically crafted the enumerated exclusion in subparagraph (D) to exclude delay only from the *filing* of the motion through its disposition. Congress's decision not to exclude preparation time is also manifest in the structure of the Speedy Trial Act and fully consonant with its objectives. The government may not circumvent Congress's choice by seeking to exclude preparation time under the general standard in (h)(1).

In response, the government offers a standard for locating un-enumerated exclusions under (h)(1) that is nearly limitless and draws scant support from the statutory text. The government then proposes a specific rule for pretrial motion preparation time that appears custom-made to match the facts of this case. Pretrial motion preparation time must automatically be excluded, the government says, when it is requested by the defendant and "additional"—that is, not "routine." The government's exclusion, however, bears no resemblance to any of the enumerated exclusions that the government concedes must guide this inquiry.

To the government, this regime is necessary to compel symmetrical treatment of pretrial motion preparation and response time and to avoid judicial waste and windfall dismissals. But policy judgments like these are for Congress to make, not the

government. In any event, Congress's decision not to include pretrial motion preparation time within the automatic exclusion in subparagraph (D) was a sound one.

Finally, the government argues that Congress's express rejection of a proposal to exclude pretrial motion preparation time under § 3161(h)(1) "shed[s] no light on how it would have viewed" the government's proposed exclusion. But the legislative history confirms what the text and structure of the Act make plain: Pretrial motion preparation time should be excluded, if at all, on a case-by-case basis under § 3161(h)(7), not automatically under (h)(1).

I. The Government's Position Is Irreconcilable With The Plain Text Of The Statute

The government offers no credible explanation why Congress, having stated quite clearly in § 3161(h)(1)(D) that the automatic exclusion for pretrial motions begins with the *filing* of a motion, must actually have intended that the exclusion should start with *preparation* of the motion. Instead, the government devises a test for identifying unenumerated (h)(1) exclusions that is unmoored from the text of the Speedy Trial Act and virtually limitless in application. The government ultimately proposes an automatic exclusion—"[d]elay arising from a district court's grant of a *defendant's* request for *additional* time to prepare pretrial motions" (U.S. Br. at 18) (emphasis added)—that cannot be squared with the enumerated (h)(1) exclusions or, for that matter, derived from its own test for identifying unenumerated exclusions.

A. The Government's Proposed Test For Identifying Un-Enumerated Automatic Exclusions Conflicts With The Text Of Subsection (h)(1)

1. The government concedes, as it must, that the subparagraphs of § 3161(h)(1) "provide guidance" as to what delays fall under the general standard. U.S. Br. 15. But the government refuses to be guided by subparagraph (D), which specifically addresses pretrial motions and declares that the automatic exclusion begins with the filing of the motion. There is no escaping the fact that the government urges an interpretation of the general standard that is flatly at odds with Congress's specific statement that the automatic exclusion of "delay resulting from any pretrial motion" begins at "filing." That is where this case should end.

Instead, the government constructs a test for identifying un-enumerated automatic exclusions under § 3161(h)(1) by looking at just *some* of the enumerated exclusions, and even those at only the highest level of abstraction. According to the government, § 3161(h)(1) excludes delays arising from "individualized" "proceedings aimed at advancing the defendant's case towards trial or other resolution (or at resolving other charges against him)," "particularly procedures of which the defendant might legitimately take advantage to pursue his defense." U.S. Br. 15, 20 & n.6. But even that is not enough. Delays may also qualify if they result from any action that is the "functional equivalent" of, "'analogous' to," "similar to," or

"ancillary to" the proceedings in the enumerated (h)(1) exclusions. *Id.* at 16–17.

Leaving aside for the moment the obvious difficulties with applying such an amalgam, the government disregards the limitations imposed by the very subparagraphs on which it ostensibly relies. Most flagrantly, the government denies that the subparagraph most relevant to the dispute in this case—subparagraph (D)—exerts any influence at all on the general standard. By the government's reasoning, because (h)(1)'s list of automatic exclusions is prefaced by "including but not limited to," subparagraph (D) "does not address delay from the preparation of pretrial motions that occurs before pretrial motions are filed." U.S. Br. 22. But it is difficult to see how Congress "did not address" preparation time when it specifically identified a starting point for the automatic exclusion—"filing"—that necessarily comes *after* preparation.

The government's reasoning also runs headlong into subparagraph (H), which is preceded by the very same "including but not limited to" qualifier. Subparagraph (H) excludes "delay reasonably attributable to any period, *not to exceed thirty days*, during which any proceeding concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(1)(H) (emphasis added). By the government's logic, subparagraph (H) just "does not address" whether delays *longer* than thirty days are automatically excludable. Indeed, under the government's standard, subparagraph (H) would seem to *call* for the exclusion, because a 31-day delay

is "analogous" or "ancillary" to the 30-day delay excluded there.

At a more fundamental level, the government is saying that any principle of limitation announced in the enumerated exclusions can be ignored because the statute leaves open the possibility that unenumerated automatic exclusions exist. And that, in turn, is just another way of saying that the enumerated exclusions should not inform the meaning of the general standard except to *expand* it. But the canons that the government agrees must guide the interpretation of the general standard—*noscitur a sociis* and *ejusdem generis* (U.S. Br. 15)—are not one-way streets. See, *e.g.*, *Washington State Dep't of Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (applying the *noscitur a sociis* and *ejusdem generis* canons to interpret a general term "far more restrictively" than it would have been interpreted "in the abstract"). The enumerated exclusions cannot illustrate what *should* be automatically excluded under (h)(1)'s general language without also telling us something about what *should not*.[1]

For similar reasons, the government's claim that petitioner improperly invoked the *expressio unius*

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[1] The government's misunderstanding of that point is what leads it to mischaracterize petitioner's position. Petitioner has never suggested "that 'Section 3161(h)(1)'s general language,' by its own terms, excludes delay resulting from the grant of a defendant's request for additional time to prepare pretrial motions." U.S. Br. 22. As we explained in our opening brief (at 20), the statute "reflects Congress's judgment that a 'proceeding' regarding pretrial motions does not begin until—as the text of § 3161(h)(1)(D) prescribes—the motion is actually filed."

canon (U.S. Br. 24) is baseless. Our position is that the Court must draw a compelling inference from the specific limitation imposed in subparagraph (D) (Pet. Br. 14–16); petitioner did not invoke (tacitly or otherwise) the *expressio unius* canon. The government's assertion that relying on subparagraph (D) to foreclose a flatly contrary interpretation of the general standard is the same thing as relying on the *expressio unius* canon is just a rehash of the government's unsupportable claim that the specific limitation of the pretrial motion exclusion "does not address" preparation time.

Likewise, the government wrongly disputes the applicability of the canon establishing that a specific statutory provision controls over one of more general application. The government claims that this principle does not apply to subparagraphs "intended to illustrate, but not to exhaust, the scope of the more general provision" because "there is no conflict" between an illustrative enumeration and the general standard. U.S. Br. 23. What the government is really saying is that there can *never* be a conflict between a general standard and a specific illustration where the series of illustrations is not exhaustive. None of the cases the government cites even remotely supports such a startling assertion. *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327 (2002), for example, establishes only the unremarkable proposition that the canon does not apply in the absence of actual conflict between the specific and general provisions. *Id.* at

335–336.[2] The government might have a point if subparagraph (D) did not contain a specific *limitation* on the pretrial motion exclusion, such that it would not necessarily be in conflict with the exclusion of additional time related to pretrial motions. But subparagraph (D) does impose clear limits by identifying both the beginning and the end of the exclusion. The government's argument is but another iteration of its misguided notion that a specific limitation merely "does not address" whether the general standard is likewise limited.

Finally, the government mistakenly asserts that its reading of the general standard would not render subparagraph (D) superfluous. According to the government, because Congress intended subparagraph (D) to expand the pretrial motion exclusion beyond what had been authorized in the 1974 version of the Act, subparagraph (D) is given effect so long as it is read to "'avoid[] an unduly restrictive interpretation of the exclusion.'" U.S. Br. 25 (quoting

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[2] In *National Cable*, the statute in question established two specific rate formulas for certain kinds of pole attachments, and some courts of appeals had concluded that Congress would not have left a residual category "for which the FCC would derive its own view of just and reasonable rates." 534 U.S. at 335. The Court disagreed, holding that "nothing about the text of [the two specific provisions], and nothing about the structure of the Act, suggest that these are the exclusive rates allowed." *Ibid.* There was, therefore, "no conflict" between the specific rate provisions and the general standard, which governed rates for pole attachments that did not fall into either of the two specific categories. See *id.* at 335–336. Here, by contrast, there is clear conflict between subparagraph (D)'s statement that the pretrial motion automatic exclusion begins at "filing" and the government's insistence that it should begin with preparation.

H.R. Rep. No. 96-390, at 11 (1979)). But that fails to give any significance to Congress's decision to prescribe a specific starting point for the exclusion—*i.e.*, to expand the exclusion only so far. And as we explain below (pp. 19–22, *infra*), that choice was quite deliberate.

2. In any event, the government's patchwork standard cannot be accepted. As noted above, the government proposes to include within the general standard in (h)(1) "individualized" "proceedings aimed at advancing the defendant's case towards trial or other resolution (or at resolving other charges against him)," "particularly procedures of which the defendant might legitimately take advantage to pursue his defense." U.S. Br. 15, 20 & n.6. In addition, the government says, (h)(1) reaches delays resulting from anything that is the "functional equivalent" of, "'analogous' to," "similar to," or "ancillary to" the enumerated (h)(1) exclusions. *Id.* at 16–17.

The most obvious problem with the government's test is that it is virtually limitless. What sort of delays *wouldn't* be caught in a net so large? Indeed, as the government candidly acknowledges, "almost everything counsel does in advance of trial can be viewed as general trial preparation." U.S. Br. 29 n.8. Surely general trial preparation is "aimed at advancing the defendant's case toward trial or other resolution" (*id.* at 15), so under the government's theory all of that would be automatically excluded. And if a pretrial event somehow does not "advance a defendant's case toward trial or other resolution," surely it could be deemed "analogous," "similar," or

"ancillary" to one or more of the enumerated exclusions.

B. The Government's Bid To Exclude "Additional" Pretrial Motion Preparation Time "Granted At A Defendant's Request" Has No Basis In The Text Of § 3161(h)(1) And No Place In This Statutory Scheme

Despite the nearly limitless principles it claims define the general standard in subsection (h)(1), the government concedes that "[a]n across-the-board exclusion for pretrial motion preparation" would leave each district court "free to amend the Speedy Trial Act by local rule." U.S. Br. 29, 30 (quoting *United States* v. *Hoslett*, 998 F.2d 648, 656 (9th Cir. 1993), and *United States* v. *Williams*, 197 F.3d 1091, 1095 n.6 (11th Cir. 1999)). Accordingly, the government announces that only "additional" time to prepare pretrial motions "granted at a defendant's specific request" ought to be excluded automatically under subsection (h)(1). *Id.* at 30. But this proposed exclusion has no basis in the text of the statute; indeed, it does not even follow from the government's own test for identifying an exclusion under subsection (h)(1)'s general standard.

1. The government rightly observes that any unenumerated (h)(1) exclusion should be "similar in nature" to the enumerated exclusions (U.S. Br. 15), but the one it ultimately proposes looks nothing like those listed in subsection (h)(1).

For starters, the statutory text makes no mention of treating time granted at the defendant's request differently from time granted under other circumstances. By its terms, the general standard

articulated in § 3161(h)(1) applies to "delay resulting from other proceedings concerning the defendant," not delay *caused by* the defendant. The subparagraphs that follow say nothing of treating defense requests differently. Subparagraph (A), for example, addresses delay caused by competency proceedings, without regard to which side requested them. Likewise, subparagraph (C) automatically excludes "delay resulting from *any* interlocutory appeal," no matter which side takes the appeal. 18 U.S.C. § 3161(h)(1)(C) (emphasis added). And, of course, subparagraph (D) specifically addresses delay resulting from pretrial motions and treats time for the defense just the same as time for the government.

If the government's attempt to create a special rule for defense requests sounds familiar, that is because the government pressed it (unsuccessfully) just three years ago. In *Zedner* v. *United States*, 547 U.S. 489 (2006), the government's leading argument was that "a defendant cannot challenge delay that he sought and the Speedy Trial Act authorizes." See Brief for the United States at 14, No. 05-5992 (Mar. 2006). Because the defendant sought the continuance, the government asserted, the defendant "cannot both reap the benefit of the continuance and challenge its validity under the [Speedy Trial Act]." *Ibid.* This Court squarely rejected that argument, holding that the delay at issue could not be excluded even though the defendant had requested it. See 547 U.S. at 503–506. This Court should reject the government's argument yet again.

Moreover, none of the enumerated exclusions distinguishes between "additional" delay and "routine" delay. Subparagraph (B), for example, automatically excludes "delay resulting from trial with respect to other charges against the defendant," but it does not purport to treat trials that proceed according to a standard scheduling order any differently from those that occasion additional delays at the request of a party. And again, subparagraph (D)'s treatment of pretrial motions makes no such distinction.

Thus, while professing to back an exclusion similar in kind to those enumerated by Congress, the government has instead proposed one that is contingent upon conditions that are not present in any enumerated exclusion. The government cannot simply tailor an exclusion to its convenience.

2. The government is wrong to assert that a "defense request" for "additional" time is of a piece with other un-enumerated exclusions under § 3161(h)(1).

The government suggests that courts routinely hold that delays caused by the "functional equivalent" of an enumerated exclusion are covered by the general standard in (h)(1). U.S. Br. 16 (citing *United States* v. *Hohn*, 8 F.3d 1301, 1304 (8th Cir. 1993); *United States* v. *Noone*, 913 F.2d 20, 27 n.12 (1st Cir. 1990); *United States* v. *Jorge*, 865 F.2d 6, 11–12 (1st Cir. 1989)). But these "functional equivalent" cases do not purport to discover *un*-enumerated exclusions under the general standard; rather, they explicitly hold that the delay falls within an *enumerated* exclusion. *Hohn*, 8 F.3d at 1304

("The period of time * * * was properly excluded pursuant to § 3161(h)(1)([D]) * * * as a pretrial motion."); *Noone*, 913 F.2d at 27 ("The entire 28 day interval between Noone's oral request * * * for reconsideration * * * and its denial * * * was excludable as 'delay resulting from any pretrial motion.' 18 U.S.C. § 3161(h)(1)([D])."); *Jorge*, 865 F.2d at 12 (1st Cir. 1989) ("Because we believe it is appropriate to treat the document as at least equivalent to a pretrial motion, we hold that it falls within subsection [D] of § 3161(h)(1)."). Indeed, the government seemed to recognize as much when opposing the petition for a writ of certiorari in this case, claiming that petitioner's waiver of his right to file pretrial motions was the "functional equivalent" of "a motion for leave to waive the right to file pretrial motions." Br. in Opp. 11–12 (citing *Hohn* and *Jorge*). The government argued that "[t]he STA clock thus stopped again under 18 U.S.C. 3161(h)(1)([***D***]) until the matter was heard by the court." *Id.* at 12 (double emphasis added). The government cannot now claim that the "functional equivalent" cases in fact are examples of courts finding un-enumerated exclusions.

The government's list of cases purportedly finding a host of un-enumerated exclusions that are "analogous," "similar," or "ancillary" to an enumerated proceeding (U.S. Br. 16–17) fares little better. Many of those cases do not create general (h)(1) exclusions at all; rather, they exclude delays under specific subparagraphs. See *United States* v. *Pete*, 525 F.3d 844, 849 (9th Cir. 2008) ("We now hold that such time is excludable under § 3161(h)(1)([C]) of the STA."); *United States* v. *Davenport*, 935 F.2d 1223,

1233 (11th Cir. 1991) ("We hold that the delay resulting therefrom is excluded from the petitioner's speedy trial clock under 18 U.S.C.A. § 3161(h)(1)([C])."); *United States* v. *Tyler*, 878 F.2d 753, 759 (3d Cir. 1989) ("[W]e hold that the [delay] was 'a period of delay resulting from other proceedings concerning the defendant' within the meaning of 18 U.S.C. § 3161(h)(1)([C])."); *United States* v. *Montoya*, 827 F.2d 143, 150 (7th Cir. 1987) ("Negotiating a plea bargain reasonably falls within the meaning of 'trial' under section 3161(h)(1)([B])."). Others confine their discussion to *dicta* or statements in the alternative. See *United States* v. *Salgado*, 250 F.3d 438, 454 n.2 (6th Cir. 2001); *United States* v. *Van Someren*, 118 F.3d 1214, 1218–1219 (8th Cir. 1997); see also *Noone*, 913 F.2d at 27 n.12; *Montoya*, 827 F.2d at 150.[3] The government's assertion that—despite what appears on the face of these opinions—these courts really meant to locate these exclusions under the general standard (U.S. Br. 17 n.4) is scant comfort.

To be sure, § 3161(h)(1) expressly contemplates the possibility of un-enumerated exclusions, and there are instances in which courts have relied on the general standard. But the government's strained

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[3] Some others draw their support from cases that exclude delay under specific subparagraphs or in *dicta*, see *United States* v. *Dunbar*, 357 F.3d 582, 593 (6th Cir. 2004); *United States* v. *Leftenant*, 341 F.3d 338, 344–345 (4th Cir. 2003); *United States* v. *Bowers*, 834 F.2d 607, 610 (6th Cir. 1987), or offer no reasoning or supporting authority at all, see *United States* v. *Goodwin*, 612 F.2d 1103, 1105 (8th Cir. 1980). All of this suggests that the purported (h)(1) exclusions are not "essential in enabling courts to comply with the STA's time limit" (U.S. Br. 18 n.5), but merely convenient.

reading of these cases vastly overstates their frequency. And what examples do exist hardly support the atextual reading of the statute the government urges here. The government offers no reason why Congress would have relegated something so common as pretrial motion preparation time to the general standard under (h)(1). And as we have explained (Pet. Br. 25, 27–29) and discuss further below (pp. 28–30, *infra*), it is abundantly clear that Congress did not just forget to consider preparation time. The point here is simply that it would be odd if Congress intended a delay that could potentially arise in every case that is headed to trial—and likely does arise in the vast majority of them—to be automatically excluded (in the face of subparagraph (D), no less) under the general standard.

3. There is yet another problem with the government's proposal to exclude only defendant-requested, additional time: It cannot be squared with the government's standard for identifying unenumerated (h)(1) exclusions.

According to the government, "[p]retrial motions * * * advance the case towards resolution because they shape the content or structure of the trial and may even eliminate the need for trial altogether." U.S. Br. 21. "The same is true," the government continues, "of additional time granted *at a defendant's request* to research, prepare, and file pretrial motions" because "[m]otions cannot be resolved fairly and accurately if a *defendant* has insufficient time to prepare them." *Ibid.* (emphasis added). Note the sleight of hand: Motions filed by either side "shape

the content or structure of the trial," but only *defensé-requested* preparation time is excluded. By the government's own logic, preparation time used by *either* side should advance the case toward resolution, and both types of delay should therefore be excluded automatically. But no such acknowledgement appears in the government's brief; indeed, there is *no discussion at all* of prosecution-requested extensions. That is because there is no principled way to distinguish them from defendant-requested extensions under the government's proposed standard.

Prosecutors, of course, routinely file pretrial motions, including motions to suppress evidence, which must be filed before trial, see Fed. R. Crim. P. 12(b)(3)(C), and not uncommonly are raised to prevent the defendant from admitting hearsay that is against the declarant's interest but lacks "corroborating circumstances clearly indicat[ing] the trustworthiness of the statement," Fed. R. Evid. 804(b)(3). The government is also required to file any motion to compel discovery from the defendant before trial. Fed. R. Crim. P. 12(b)(3)(E). Reciprocal discovery from the defendant is common in modern federal criminal practice. See Fed. R. Crim. P. 16(b). The government frequently files other pretrial motions *in limine*, pretrial motions to revoke bail or modify the conditions of release, and motions addressing a variety of other matters. The government's failure to address how its rule would apply to—or could be upheld in light of—such everyday occurrences is telling.

Neither does the government's reading of (h)(1) justify the restriction of its proposed exclusion to "additional" preparation time. Surely "routine" preparation time "advances a case toward trial" just the same as "additional" preparation time. The government apparently believes otherwise, asserting in a footnote that that delay-causing proceedings must be "individualized," and that "[t]ime granted by a local rule or a routine order entered at the outset of every case" does not result from an "individualized" proceeding. U.S. Br. 20 n.6. But the government does not attempt to explain what that means or where this qualifier came from. Certainly it did not come from the text; as explained above (pp. 9–10, *supra*), none of the enumerated exclusions makes any mention of whether the delay is granted as a matter of course or in response to a specific request.

4. The final flaw in the government's proposed exclusion is the host of practical problems that would follow its adoption. Making the automatic exclusion of delay turn on who requested it may sound simple to the government's ears, but the reality is much more complicated. As we explained in our opening brief, this Court has recently noted the difficulty inherent in a rule that depends on whether a party makes a specific request. See Pet. Br. 38 (citing *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2084 (2009) (holding that a standard that turns on whether the defendant affirmatively invoked or requested counsel would be "mysterious" in application); 129 S. Ct. at 2094 (Stevens, J., dissenting) (agreeing that standard would be "unworkable")).

The government offers no response. Rather, it leaves unanswered any number of questions that follow from a rule triggered by a "defense" request: What is a court to do when the prosecution and the defense jointly propose a scheduling order? What about a joint motion specifically requesting an extension of time to file pretrial motions? Does it make a difference if the government simply lodges no objection to a defense request? Local rules requiring the parties to attempt to reach an agreement on such matters are the norm. See, *e.g.*, D. Mass. L.R. 7.1(a)(2) ("No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue."). The government's proposal, however, would encourage the government to withhold consent in order to take advantage of the automatic exclusion.

There are still further problems with automatically excluding only "additional" preparation time, beginning with the uneven impact it would have across jurisdictions. Many districts have local rules or standing orders that anticipate the filing of pretrial motions, but those rules are not uniform, and some districts have no standing orders regarding motion scheduling. See, *e.g.*, D.D.C. L.Cr.R. 45.1(B)(6) (pretrial motions due within 11 days of arraignment, with five days for response); N.D. Ill. L.Cr.R. 12.1(a) (pretrial motions "shall be filed within the time set by the court" or, if no time is set, within 21 days of arraignment); N.D. Cal. Crim. L.R. 12-1 (pretrial motions deadline set by assigned judge). If only "additional" time were to be excluded, those discrepancies would have consequences under the Speedy Trial Act.

The local rule in force in this case illustrates the difficulty of implementing the government's proposed exclusion. Eastern District of Missouri Local Rule 3.05 states that "[d]eadlines for filing any pretrial motions[] shall be governed by an order of Court entered at or after a defendant's arraignment." E.D. Mo. L.R. 3.05. On the day of petitioner's arraignment, the presiding magistrate judge issued an "Order Concerning Pretrial Motions" setting the trial date and the deadlines for motions and responses. See Dkt. Nos. 16, 17. Was the order "individualized" or simply "routine"? Does the answer depend on whether the magistrate discussed the deadlines with the parties before setting them or issued the order as they walked into the courtroom? If the dates that appear in the order were set after consultation with both parties, were they at the request of one party or the other? The government's proposed exclusion raises many more questions than it answers.

II. The Government Cannot Circumvent The Clear And Reasonable Legislative Choices Embodied In The Act

Much of the government's brief is devoted to arguing that the Speedy Trial Act *ought* to exclude pretrial motion time automatically. But the government's preferences are no substitute for Congress's clear decision to the contrary. In any event, Congress's choice not to make pretrial motion preparation time automatically excludable was eminently sensible.

A. The Enumerated Exclusion In Subparagraph (D) Reflects Specific And Reasonable Congressional Choices

1. Congress expressly excluded all time "from the filing of [a pretrial] motion through the conclusion of the hearing on, or other prompt disposition of, such motion." § 3161(h)(1)(D). Observing that the time spent responding to a pretrial motion falls within that automatic exclusion, the government argues that it makes "scant sense" not to have a matching exclusion for time spent preparing the initial motion and that the general standard should therefore be read to establish one. U.S. Br. 19 (citing *United States* v. *Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008)). The government is wrong.

First and foremost, *Congress* thought it made sense to treat them differently. The enumerated exclusion in subparagraph (D) expressly begins with "filing." Even the government does not dispute that time spent preparing the initial motion does not fall within that exclusion, but the government fails to acknowledge that this reflects a considered judgment by Congress. Whatever the wisdom of that decision as a policy matter, there can be no doubt that Congress understood that commencing the automatic exclusion in subparagraph (D) at "filing" would leave preparation of the initial motion outside the exclusion.

Contary to the government's suggestion, *Henderson* v. *United States*, 476 U.S. 321 (1986), does not permit this Court to second-guess such choices. The question in *Henderson* was whether certain time was within the enumerated exclusion in

what is now subparagraph (D). That is made crystal clear in the very first paragraph of the Court's opinion. 476 U.S. at 322 ("This case requires us to decide the narrow questions whether that exclusion [in subparagraph (D)] is limited to reasonably necessary delays, and whether it applies to delays occasioned by the filing of posthearing briefs on motions."). The Court held that subparagraph (D) was not limited to a "reasonable" period under which the motion is under advisement and that it necessarily excluded time during which "the court remains unable to rule." *Id.* at 331. The Court did *not* purport to interpret the general standard under (h)(1), much less to hold that the general standard could be interpreted to evade a specific limitation in the enumerated exclusion if a court later decides that it would "make * * * sense" (U.S. Br. 19) to do so.

Even if symmetrical treatment of motion preparation and response preparation were the paramount objective, the government's rule does not achieve it. Under the government's proposed exclusion, "routine" *motion* preparation time would not be excluded, but "routine" *response* preparation time would. The government's bid for symmetry thus proves too much.

2. In any event, treating pretrial motion preparation differently from response time does make sense. Preparing initial motions is a significantly different exercise than preparing responses. The former can involve considerable uncertainty about which motions to file, how to frame the arguments, and what relief to seek. Response papers, by contrast, typically require a

more limited exposition of why the requested relief should be denied. This Court's rules, for example, recognize the difference between preparing an opening submission and responding to it. Compare S. Ct. R. 13.1 (providing 90 days within which to file a petition for a writ of certiorari) with S. Ct. R. 15.3 (providing 30 days within which to file a brief in opposition); compare S. Ct. R. 25.1 (providing 45 days within which to file an opening merits brief) with S. Ct. R. 25.2 (providing 30 days within which to file a responsive merits brief). Congress sensibly determined that the narrowed field of play when preparing a response warranted automatic exclusion, but that the uncertainty and variety of delays associated with preparing the initial motion did not. Congress contemplated that delays resulting from preparation of the initial motion would be addressed on a case-by-case basis under (h)(7). See S. Rep. No. 96-212 (1979), at 33–34; pp. 28–30, *infra*.

3. The government also objects to dismissals under the Speedy Trial Act that it claims are based on "technicalities." See U.S. Br. 27, 28, 32–33. To the government, literal enforcement of the Act "would frustrate, rather than advance, the public's interest in speedy trials." *Id.* at 27. The government, however, fundamentally misapprehends the character of the Speedy Trial Act, which rests almost entirely on a series of discrete lines drawn by Congress. For example, the Act provides 70 nonexcludable days within which to bring a defendant to trial, not 71, see § 3161(c)(1); likewise, § 3161(h)(1)(H) excludes up to 30 days, not 31, during which a pretrial motion is under advisement. Thus, in contrast to a defendant's relatively

"amorphous" Sixth Amendment right to a speedy trial, *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1290 (2009) (internal quotation marks omitted), the Act expressly contemplates the enforcement of what the government disparages as "technical" requirements to ensure compliance with its objectives.

Moreover, the use of dismissal as a sanction—even the relatively mild sanction of dismissal without prejudice—reflects an entirely reasonable congressional judgment that making certain prosecutions more cumbersome (or even impossible) in response to a violation of the Act will result in speedier trials overall. See *Zedner*, 547 U.S. at 499. Dismissals without prejudice "promote compliance with the Act without needlessly subverting important criminal prosecutions." *Ibid.* Congress could have included a harmless error exception for "technical violations," but it did not, and this Court should reject the government's implicit invitation to create one.

B. The Government's Parade Of Horribles Will Not Materialize

The government predicts that all manner of maladies will result if pretrial motion preparation time is not automatically excluded: Making explicit ends-of-justice findings will waste judicial resources; or judges will forget to make them; or defendants will "game the system" and benefit from windfall dismissals; or judges might "inappropriately" deny requested preparation time. U.S. Br. 27–28. All wrong.

1. The government's first complaint is that requiring judges to exclude preparation time under

the ends-of-justice provision in subsection (h)(7) would waste courts' time by requiring them to make explicit findings that are (the government claims) already "inherent in the grant of additional time to prepare motions." U.S. Br. 26–27. The government does not explain why it is especially difficult to put ends-of-justice findings on the record, and common experience is to the contrary. The Act specifically permits judges to set forth the findings "orally or in writing," § 3161(h)(7)(A), so making the findings explicit will hardly consume significant resources in cases where exclusion is warranted.

Moreover, it is not necessarily the case that by granting such a request the district court has concluded that the ends of justice "outweigh the best interests of the public and the defendant in a speedy trial." § 3161(h)(7)(A). Were it otherwise, the corollary would also be true: District courts would lack the *authority* to grant a defense-requested continuance unless doing so met the (h)(7) criteria. The government stops short of such an assertion, and for good reason. Surely a district court has the power to grant a defense request for additional time where the asserted justification is mere convenience or even a lack of due diligence, even if the ends of justice would not outweigh the public's and the defendant's speedy trial interests.

Implicit in the government's "inherent finding" argument is the idea that the ends-of-justice test prescribed by subsection (h)(7) imposes no hurdle to the granting of an exclusion. But while the provision is no doubt frequently invoked, it expressly requires

an assessment of statutorily prescribed criteria at odds with the government's characterization.

More particularly, subparagraph (h)(7)(B) lays out four factors a district court must consider before excluding a continuance under (h)(7), three of which are relevant here and in the vast majority of cases.[4] The court must ask whether failure to grant an (h)(7) continuance would "be likely to make a continuation of such proceeding *impossible*, or result in a *miscarriage of justice*," § 3161(h)(7)(B)(i) (emphasis added); whether the case is "so *unusual or so complex* * * * that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established," § 3161(h)(7)(B)(ii) (emphasis added); and whether, in non-complex cases, failure to grant an excluded continuance "would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, *taking into account the exercise of due diligence*," § 3161(h)(7)(B)(iv) (emphasis added). It is difficult to square these criteria with the government's apparent belief that the (h)(7) findings are a mere formality *whenever* the defense receives additional time to prepare pretrial motions.

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[4] The fourth criterion applies to cases in which arrest precedes indictment and requires courts to consider whether the timing of the arrest or the complexity of the case makes timely return of the indictment unreasonable. 18 U.S.C. § 3161(h)(7)(B)(iii).

Even if the (h)(7) test were almost always satisfied when a defense request is granted, this Court has recognized that the process of making the (h)(7) findings is essential to the Act's scheme. That is the very holding of *Zedner*, which declared that the defendant cannot prospectively waive the Act's application, 547 U.S. at 503, and that the (h)(7) findings cannot be supplied retrospectively, *id.* at 506 ("In the first place, the Act requires express findings, and in the second place, it does not permit those findings to be made on remand as the Government proposes."). See also *id.* at 509 ("The strategy of § 3161(h)([7]), then, is to counteract substantive open-endedness with procedural strictness.").

Nor is it the case that the district court's granting of a defense continuance "shows that the public interest is * * * served by delaying trial." U.S. Br. 21. If the exclusion is automatic, the district court is never even asked to consider the public's interest. Likewise, it is not true that "the opportunity for an adversary presentation" (*ibid.*)—by which the government presumably means government opposition to a requested continuance—protects the public's interest. The government's principal concern in any particular case is not to safeguard the public's speedy trial interest; indeed, as noted above (p. 17, *supra*), counsel are frequently required by rule to agree to requested continuances whenever possible.

2. The government also fears that busy district court judges will forget to make ends-of-justice findings altogether, resulting in "windfall" dismissals for opportunistic defendants who "game the system."

U.S. Br. 27–28. Given the omnipresence of the Speedy Trial Act, however, forgetting to make findings seems unlikely (especially with the prosecution there to remind judges of the obligation). And, of course, the district court need not make any such findings until the defendant moves to dismiss on Speedy Trial Act grounds. *Zedner*, 547 U.S. at 507. It is difficult to see how judges will be caught unaware.

But even supposing such failures do occur, the defendant is unlikely to receive a "windfall." District courts retain (guided) discretion to dismiss the indictment without prejudice, allowing the prosecution to bring the case again. See 18 U.S.C. § 3162(a) (listing "the facts and circumstances of the case which led to the dismissal" as a factor to consider when deciding whether to dismiss a case without prejudice). The opportunity to be re-indicted and re-tried is hardly a bonanza for defendants.

Nor is there any real likelihood that defendants could successfully "game the system" (U.S. Br. 28). As explained in our opening brief (at 20–21), district courts and prosecutors will adjust to a clear rule that pretrial motion preparation time is not automatically excluded. The government does not seriously dispute that fact. There is no realistic possibility that a defendant could outfox the district court and the prosecution.

3. The government even goes so far as to suggest that, in the absence of automatic exclusion, "judges might inappropriately deny the requested time." U.S. Br. 27. That assertion rests on a subtle but important fallacy—namely, that granting additional

time to prepare pretrial motions necessarily delays trial or prejudices the government. Not so. A district court can extend the deadline for filing pretrial motions without moving the trial date, which avoids any consequence under the Act. Even if granting additional motion preparation time does delay the trial, the government (and the district court) need only pay careful attention to the number of unexcluded days remaining to avoid a violation.[5] Because pretrial motions are typically filed soon after the speedy trial clock starts to run, moreover, there will almost always be ample time remaining within which the government can bring the defendant to trial. What is more, there is some evidence that, in response to the passage of the Speedy Trial Act, prosecutors began conducting a substantial portion of their case before indictment, leaving less to accomplish during the allotted 70 days. See Linda M. Ariola et al., *The Speedy Trial Act: An Empirical Study*, 47 Fordham L. Rev. 713, 741–742 (1979). And the government points to no evidence suggesting that district courts in jurisdictions that have rejected the rule adopted below in fact "inappropriately" deny defense requests for additional time.

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[5] Some courts even require one or both of the parties to share their tally of excluded and unexcluded days at various points during the pretrial proceedings. See, *e.g.*, N.D. Cal. Crim. L.R. 47-2(c) (requiring the government to address the "Speedy Trial Act Implications" of any paper it files "concerning any matter to which an exclusion * * * may apply," and requiring the defendant to respond); D. Mass. L.R. 116.5(A)(5), 116.5(C)(8) (requiring the parties to address Speedy Trial Act exclusions in the initial status conference and file a joint memorandum again addressing exclusions before the final status conference).

III. The Government's Attempt To Evade The Act's Legislative History Is Unavailing

The government briefly contends that the legislative history of the Speedy Trial Act supports the automatic exclusion of pretrial motion preparation time. The government is wrong.

1. The government first argues that the express rejection of a proposal to include pretrial motion preparation time within the automatic exclusion in subparagraph (D) says nothing about the question presented here. See U.S. Br. 33–35. Of course, that assertion assumes the very conclusion that the government hopes to prove—*i.e.*, that additional time requested by the defense should be treated differently. Moreover, it could hardly have been unknown to Congress when it rejected an exclusion for *all* preparation time that it was also rejecting an exclusion for defendant-requested, additional preparation time.

The government next claims that the Senate Judiciary Committee Report "expressed opposition to the automatic exclusion of *all* time *routinely allotted* for motions preparation"—it said nothing about "additional" time. See U.S. Br. 34–35. In fact, the Committee Report rejected an automatic exclusion for preparation time "*in routine cases*," S. Rep. No. 96-212, at 34 (emphasis added), not preparation time that is "*routinely allotted*." In other words, the Senate Committee determined that, in most cases, the parties should be able to prepare pretrial motions within the Speedy Trial Act's limits. In non-routine cases, exclusion remains an option under subsection (h)(7). There is no room in this framework for an

automatic exclusion of pretrial motion preparation time.

2. The government suggests that its proposed exclusion is in accord with the legislative history because "[t]he legislative history is silent on which provision of the [Speedy Trial Act] most appropriately accommodates grants of additional motions preparation time in non-complex cases." U.S. Br. 37.[6] But as the government admits (see *id.* at 35–36), the legislative history *does* say quite clearly that Congress amended the portion of (h)(7) that deals with complex cases in order "to address, in part, the preparation time problem regarding *pretrial motions*," S. Rep. 96-212, at 34 (emphasis added) (discussing what is now § 3161(h)(7)(B)(ii)). Why would Congress need to do that if it intended for that time to be excluded automatically under subsection (h)(1)? The government has no answer.

3. Despite its eagerness to retreat from the Act's legislative history, the government invokes it to argue that Congress "forcefully disapproved of narrow and inflexible interpretations of the automatic exclusion provisions akin to the interpretation that petitioner proposes here." U.S. Br. 37. As explained in our opening brief (at 31–32), Congress was concerned in 1979 that the original Speedy Trial Act exclusions had been interpreted too narrowly, see, *e.g.*, S. Rep. No. 96-212, at 18, 26; H.R. Rep. No. 96-390 (1979), at 10. For that reason, it expanded them—subparagraph (D) included—so that

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[6] Note that the government's proposed exclusion has again been narrowed, this time to only non-complex cases. Compare with pp. 3–4, *supra*.

even when interpreted "strictly," they would have the desired scope. See, *e.g.*, *Henderson*, 476 U.S. at 327–328; S. Rep. No. 96-212, at 33. The government points to no evidence suggesting that Congress believed its revisions of the enumerated exclusions were insufficient to address its concerns and would therefore favor an interpretation of the general standard that swallows the limitations set forth in subparagraph (D).

The fact remains that the Act's drafters were specifically asked—by the government, no less—to make pretrial motion preparation time subject to automatic exclusion. The drafters rejected that request as "unreasonable" and concluded that preparation time should be addressed on a case-by-case basis under (h)(7). S. Rep. No. 96-212, at 33–34. The government's bid to circumvent that clear choice should meet a similar fate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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TAYLOR JAMES BLOATE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of petitioner.

INTERESTS OF *AMICUS CURIAE*[1]

NACDL is a nonprofit organization with a direct national membership of more than 12,500 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL recognizes that the

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[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Speedy Trial Act's time limitations impose a burden on defense lawyers in the preparation of cases for their clients, but the Act ultimately benefits criminal defendants—to whom defense lawyers and the NACDL owe a duty of loyalty—and such time limitations also benefit society at large. Thus, NACDL respectfully submits this brief to urge the Court to reject proposed expansions of the automatic exclusions to the Act's limitations period that threaten achievement of the objectives that underlie the Act, such as the exclusion for pretrial motion preparation at issue here, even if the delay is requested by defense counsel and especially where the exclusion is inconsistent with congressional intent.

SUMMARY OF ARGUMENT

Congress enacted the Speedy Trial Act in 1974 "to assist in reducing crime and the danger of recidivism by requiring speedy trials." Pub. L. No. 93-619, 88 Stat. 2076 (1974).[2] As this Court has recognized, the Act's requirement that a criminal trial commence within a specified time frame, or that the indictment be dismissed, *benefits the public*, even in

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[2] The Act requires, among other things, that the trial of a criminal defendant commence within 70 days of his indictment or first court appearance, whichever is later. 18 U.S.C. § 3161(c)(1). If the defendant is not tried within the prescribed time period, the charges must be dismissed upon motion of the defendant. 18 U.S.C. § 3162(a)(2).

circumstances where both the prosecutor and the defense counsel might desire to delay the running of the Speedy Trial Act clock. *Zedner v. United States*, 547 U.S. 489, 501 (2006).

Rather than require dismissal of the indictment, the Eighth Circuit below interpreted the Act to permit an automatic exclusion from the Speedy Trial Act clock of the period of time that the parties spend preparing pretrial motions. Such an exclusion is not consistent with the specific language Congress used to carve out exceptions to its speedy trial limitations rule, nor does it further Congress's objectives in mandating speedy criminal trials.

A. The public benefits of providing speedy criminal trials are not only theoretical but are also supported by empirical data and other evidence regarding the administration of criminal justice. Data demonstrate that the Act has affected the processing speed of the slowest criminal cases, which decreases the adjudication times for all cases on average. Moreover, the Act and other speedy trial mandates have contributed to the development of a federal courthouse culture that values, and thus in turn facilitates, reductions of unwarranted trial delay.

Speeding up the process of criminal adjudications has several practical benefits for the public, as Congress intended. It advances the cause of justice because fresher, better evidence can be offered when defendants receive speedier trials. It saves money and time, because fewer jails are required when

defendants are not being detained for long periods pretrial and because mandating faster trials generates bargaining about guilty pleas. It also permits adherence to foundational principles regarding treatment of persons accused of crimes, while at the same time maintaining, if not improving, public safety.

In addition to these practical benefits, the Act serves other significant societal purposes, such as protecting innocent defendants from mistaken identification and wrongful conviction; promoting fundamental fairness, individual liberty, and other core criminal justice values; and facilitating effective enforcement of the Sixth Amendment's speedy trial guarantee.

B. Because Congress recognized that unwarranted delay in the accrual of the Act's limitations period thwarts the public benefits that the Act was designed to achieve, Congress was quite careful to delineate specifically the narrow circumstances under which the Act's limitations period can be tolled. *See* 18 U.S.C. § 3161(h). The exclusions enumerated in the statute reflect deliberate policy choices about the extent to which achievement of the public benefits must yield to due process and practicability concerns when the Act's limitations rule is applied.

This Court should not recalibrate Congress's careful balancing of these interests, even if the proposed expansion of the automatic exclusions is

requested by the defense. Delay in the commencement of trial does not always benefit the defendant. And this Court has already rejected the contention that the Act's exclusions are to be evaluated in light of the interests of the parties. *Zedner*, 547 U.S. at 501. Careful scrutiny of any proposed automatic exclusion is necessary to ensure that, regardless of the parties' desires, the requested additional delay is consistent with the will of Congress and does not substantially impede achievement of the important objectives of the Act.

C. An automatic exclusion for the time parties spend preparing pretrial motions—which defense counsel requested below and the lower court deemed permissible under section 3161(h)(1)—cannot withstand scrutiny. Section 3161(h)(1)(D)[3] clearly manifests Congress's determination that, as concerns motions practice, the benefits of speedy trials are subordinate to the administrative needs of the trial judge, not the litigants. This makes eminent sense because it is consistent with efficient criminal justice administration overall, given the judge's responsibility for managing the docket, the fact that motions can be case dispositive, and the likelihood that such expansion of the motions exclusion would

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[3] In accordance with the recent technical amendments to the statute, the automatic exclusion that tolls the Act's limitations period during the time from the "filing" to the "disposition" of pretrial motions (former section 3161(h)(1)(F)) is referred to in this brief as section 3161(h)(1)(D).

delay criminal case adjudication substantially. Focusing on the perceived inequities between the movants and respondents misses the bigger picture: Congress made a specific judgment call on this particular issue, which is reflected in the text of Section 3161(h)(1)(D). Courts need to honor that determination by refusing to expand the scope of the motions exclusion.

ARGUMENT

THE SPEEDY TRIAL ACT ADVANCES THE PUBLIC'S INTEREST IN AN EFFICIENT AND FAIR CRIMINAL JUSTICE SYSTEM, AS CONGRESS INTENDED, AND THIS COURT SHOULD REJECT ANY EXPANSION OF THE ACT'S AUTOMATIC EXCLUSIONS THAT THREATENS ACHIEVEMENT OF THE IMPORTANT PURPOSES AND SIGNIFICANT BENEFITS OF THE ACT

The Speedy Trial Act mandates that a criminal defendant's trial "shall commence within seventy days" of the defendant's indictment or "the date the defendant first appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). The Act provides that "[i]f a defendant is not brought to trial within the time limit required by [the statute], the information or indictment shall be dismissed on motion of the defendant." *Id.* § 3162(a)(2).

The Act also expressly excludes eight categories of time from the calculation of the 70-day period in which a trial must commence. *Id.* § 3161(h). As

petitioner establishes in his brief on the merits, the court of appeal's ruling below—which held that the time spent *preparing* pretrial motions can be automatically excluded under section 3161(h)(1)—cannot be reconciled with the plain language of the Act. This is so because the Act not only automatically excludes certain "delay resulting from any pretrial motion," *id.* § 3161(h)(1)(D), but also specifies that only the time "from the *filing* of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" fits within that automatic exclusion. *Ibid.* (emphasis added). Had Congress intended *any* and *all* time related to pretrial motions to be excluded, it would have said so.

Moreover, as argued below, the listed automatic exclusions reflect specific policy judgments that Congress made in light of the importance of the Act's objectives and the significance of the public's interest in providing speedy trials. Expansion of these exclusions to delay further the start of criminal trials recalibrates Congress's careful balancing of interests and threatens achievement of the significant public benefits that the Act provides.

A. The Act's Limitations Period Furthers Several Important Public Objectives

The Speedy Trial Act was enacted as an antidote to lengthy trial delays that, as of the early 1970s, had created an enormous backlog in federal criminal justice processes, which, in turn, gave rise to a host

of serious societal ills. Congress viewed the many "ramifications" of delayed criminal trials as a significant problem that was "highly prejudicial to the public interest" because it decreased accountability, increased danger of recidivism, undermined the deterrent value of swift punishment, and eroded public "confidence in the fairness and administration of criminal justice." S. Rep. No. 96-212, at 6 (1979). Empirical evidence demonstrates that the Act has been successful in creating incentives for the efficient movement of cases through the federal criminal justice system and in reinforcing many of our most important legal norms, including the Sixth Amendment's speedy trial guarantee. The ruling below, which expands the automatic exclusions to the Act's limitations rule, threatens continued achievement of these important objectives.

1. The Act motivates action in the adjudication of criminal cases, which yields many practical benefits for society

a. Prior to the enactment of the Speedy Trial Act in 1974, the mean case processing time for federal criminal cases was at least four months. *See* Joel H. Garner, *Delay Reduction in the Federal Courts: Rule 50(b) and the Federal Speedy Trial Act of 1974*, 3 J. Quantitative Crim. 229, 239 (1987). The Act and its dismissal sanction reduced that time from four months to three between 1975 and 1982. *Ibid.* This reduction was driven in part by a 20 percent decrease

in the time required to resolve the slowest overall cases. *Ibid.*[4]

Studies of state-level speedy trial legislation have found similar effects. For example, researchers analyzing the effect of speedy trial statutes in several Midwestern states found that the laws caused cases to be adjudicated more quickly, partly because of the incentives created by dismissal (and similar sanctions) in those laws. *See, e.g.*, Roy B. Flemming, Peter F. Nardulli & James Eisenstein, *The Timing of Justice in Felony Trial Courts*, 9 L. & Pol'y 179, 198 (1987); Charles W. Grau & Arlene Sheskin, *Ruling Out Delay: The Impact of Ohio's Rules of Superintendence*, 66 Judicature 108, 116-117 (1982).

By mandating the commencement of trials within a set period of time, at the risk of dismissal of the indictment, the Act also refocused participants in the criminal justice process (*i.e.*, prosecutors, defense counsel, and trial judges). These participants quickly came to understand that the complacency that had given rise to a need for the legislation was unacceptable. *See, e.g.*, S. Rep. No. 96-212, at 8

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[4] Researchers observed a similar pattern on a geographic basis in the 1970s and early 1980s, with case processing time reductions in the slowest judicial circuits bringing those circuits substantially closer to overall mean disposition times. *See* Nancy L. Ames, Theodore M. Hammett & Lindsey D. Stellwagen, Office of Legal Policy, Dep't of Justice, THE IMPACT OF THE SPEEDY TRIAL ACT ON INVESTIGATION AND PROSECUTION OF FEDERAL CRIMINAL CASES 82 (1985).

("None of us interested in the administration of criminal justice, * * * whether inside or outside of the Government, whether within or without the bench and bar, can fail to be struck by the stark fact of intolerable delays in our system of administering criminal justice." (quoting Statement of then-Assistant Att'y Gen. William H. Rehnquist)). And that new shared understanding gave rise to broad-ranging reforms, such as revised organizational structures and active management policies within U.S. Attorneys' offices, and new case tracking systems within courts. *See, e.g.*, Ames, *supra*, at 82-83; Statement of U.S. Attorney Whitney North Seymour, Jr., delivered August 15, 1972, *reprinted in* 118 Cong. Rec. 30404, 30405 (Sept. 13, 1972) [hereinafter "Seymour Statement"]; *see also* John C. Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 Ala. L. Rev. 265, 266 (1972) ("The realization has taken root that the expedition of criminal trials is a responsibility shared by many who participate in the administration of criminal justice, rather than, as often viewed, an annoying tactical maneuver used by the informed and persistent defendant.").

b. Even minor increases in efficiency in regard to the processing of criminal cases have substantial practical benefits for the public.

First, the provision of speedy trials promotes just outcomes in criminal cases. A 1980 study of pre-Act data regarding the speed with which criminal cases were adjudicated discovered a clear correlation between the speed of adjudication and the rate of

conviction—a connection that the researchers hypothesized was attributable to speed's effect on evidence preservation. *See* Victoria L. Swigert & Ronald A. Farrell, *Speedy Trial and the Legal Process*, 4 L. & Hum. Behav. 135, 140 (1980).[5] The search for truth in our adversarial criminal justice system clearly requires *reliable* evidence, and such evidence becomes increasingly difficult to produce with the passage of time, regardless of whether it is offered by the prosecution or the defense. *See Doggett v. United States*, 505 U.S. 647, 654-656 (1992); *see also* Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1898-1899 (2005). Thus, speedy adjudication of criminal charges advances the cause of justice.

Efficient criminal process also preserves public resources—both time and money. The public gains from speedy resolution of criminal cases because getting cases to trial faster reduces the costs related

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[5] After speedy trial guidelines were adopted by the Second Circuit on its own initiative in 1971, the United States Attorney for the Southern District of New York similarly observed that conviction rates had increased as a result. *See* Seymour Statement, *supra*, at 30405. A report by the Administrative Office of the U.S. Courts ("AOUSC") and analyzed in the early 1980s also supports this conclusion. The Administrative Office found that overall conviction rates for federal defendants tried by court or jury increased from 77.6% in 1976 to 80.5% in 1980. *See* AOUSC *Sixth Report on the Implementation of Title I of the Speedy Trial Act of 1974*, at 35 (Feb. 1980) [hereinafter "AOUSC Sixth Report"].

to prolonged incarceration of individuals who have not yet been convicted of committing crimes. *See* Amanda Petteruti & Nastassia Walsh, Justice Policy Inst., *Jailing Communities: The Impact of Jail Expansions and Effective Public Safety Strategies* 18 (April 2008) (the average daily cost to a local county of incarcerating one pretrial detainee is $58.64, for a minimum of $21,403 if pretrial detention lasts a year); *cf.* Tim Craig, "Non-Violent Offenders Could Get Out Early," THE WASHINGTON POST, Feb. 3, 2009, at B1 (each of Virginia's 41 correctional facilities costs $25 million annually to operate). The public also benefits when the cost of a trial is entirely avoided—a result that occurs most frequently when plea-bargains are struck, which tends to happen more in the wake of speedy trial legislation. *See* Seymour Statement, *supra*, at 30405 (the rate of disposition of criminal cases jumped 20% in S.D.N.Y. the first full quarter after the Second Circuit's speedy trial rules went into effect, all due to increased guilty pleas); Barry Mahoney et al., CHANGING TIMES IN TRIAL COURTS 81 (1988) ("[N]othing is more likely to produce a settlement in a case then the imminent and unavoidable prospect of actually going to trial.").

As a final practical matter, speedy trial legislation is capable of achieving a feat that few other policy initiatives can match: it can maintain public safety while at the same containing costs and also upholding basic values about the restraint of individuals in a free society. *See* Susan N. Herman, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL 205 (2006).

This is so because of the assessments that judges are likely to make in a world in which trials are *not* predictably forthcoming.

In the absence of a speedy trial mandate (or the existence of one with so many unenumerated categorical exceptions that the limitations period is rendered illusory), some judges who might be tempted to release non-dangerous alleged offenders would choose, instead, to deny bond and to keep such individuals incarcerated (on the public's tab) to avoid the risk that they would commit crimes while on release during the uncertain and potentially lengthy period of pretrial delay. Other judges, who might worry about breaching the public trust by keeping people who have not been convicted of crimes locked up for uncertain and potentially lengthy periods of time, would authorize bond liberally, releasing many alleged offenders, and thereby put the public at the mercy of some dangerous individuals who might commit new crimes while roaming the streets during the period of pretrial delay. The provision of speedy trials solves *both* problems: the non-dangerous offenders get released, and the dangerous offenders remain in jail, both at a reduced net cost to society. *See* Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. Chi. L. Rev. 667, 668-669 (1976); *see also* Herman, *supra*, at 205 (the Act "responded to public concerns about preventing crime and controlling dangerous offenders" while at the same time providing "an alternative to preventive

detention as a means of addressing the public's concerns").

These outcomes are not speculative. Statistics from the late 1970s gathered by the Administrative Office of the United States Courts suggests that the Speedy Trial Act has this effect. *See* AOUSC Sixth Report, at 27 (percent of defendants detained in custody prior to trial decreased from 39.4% to 31% from 1976 until 1980). And this effect was precisely what Congress intended when it enacted the Speedy Trial Act to "ensure[ ] that defendants are brought to trial quickly enough that the pretrial controls only need to be used for a minimum time." Herman, *supra*, at 205 (quoting statement of then-Representative Abner Mikva).

2. The Act serves as a bulwark against the prosecution and conviction of innocent defendants

Another significant public benefit that results from legislation mandating speedy trials is the protection that it affords to *innocent* people who are mistakenly accused of criminal wrongdoing by the government. Just in the past decade, there have been many reports about persons wrongly accused, and in some cases convicted, of very serious crimes. *See, e.g.*, Ralph Blumenthal, "15th Dallas County Inmate Since '01 is Freed by DNA," N.Y. Times, Jan. 4, 2008, at A11; Solomon Moore, "DNA Exoneration Leads to Change In Legal System," N.Y. Times, Oct. 1, 2007, at

A22; *see also* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 Crim. L. & Criminology 523 (2005).[6] Many more of these sad situations likely would occur in the absence of legislation requiring speedy trials.

The relatively stringent time constraints set forth in speedy trial legislation compel the prosecutor to assemble, review, and thoroughly evaluate her case *before* the charges are brought. *See* Linda M. Ariola et al., *The Speedy Trial Act: An Empirical Study*, 47 Fordham L. Rev. 713, 741-742 (1979). Statistical reports confirm that, as a result of the speedy-trial time constraints, some federal prosecutors withhold arrests until after indictment and sometimes downgrade charges. *See* AOUSC Sixth Report, at 42. The Act's time limitations thus contribute to the "increased quality of indictments," Seymour Statement, *supra*, at 30405, which benefits innocent defendants, as well as the public, because weak cases are identified early and screened out, leaving more

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[6] Such mistaken identifications have occurred nationwide and have not been limited to local prosecutions. Mistakes have been made even in regard to alleged federal crimes in high-profile cases. *See, e.g.*, Mark Larabee & Ashbel S. Green, "One Mistaken Clue Sets a Spy Saga in Motion," THE OREGONIAN, Mar. 26, 2006, at A1 (describing the two-week long detention of a Portland-area lawyer on a material witness warrant that was issued based on the federal government's erroneous allegation of a connection between his fingerprint and the 2003 Madrid terrorist bombings).

resources for the most meritorious matters. *See* Ames, *supra*, at 29-31, 112-127.[7]

The Act also helps the innocent criminal defendant cope with the unfortunate circumstance of being charged with a federal crime. *Cf.* Frase, *supra*, at 667 (the speedy trial right "minimize[s] the anxiety, public scorn and suspicion, and potential 'chilling effect' of unresolved charges"). It both ensures that such person can exonerate himself in a timely manner and also limits the government's leverage to extract a guilty plea.[8] Prior experience amply demonstrates that in the absence of speedy trial legislation, "[i]nnocent persons unable to make

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[7] As the United States Attorney for the Southern District of New York noted in candid remarks made in 1972:

> When a younger Assistant U.S. Attorney must face the fact that he will have to present his evidence to a trial jury in approximately sixty days, he is much more likely to take a jaundiced look at the evidence presented to him by the investigative agency, and to ask more hard questions at the threshold of the prosecution, rather than waiting until some far-off day of preparation for trial. He knows that he is preparing for trial from the start and that there will be no future opportunities to fill in the gaps in the proof if they exist.

Seymour Statement, *supra*, at 30405.

[8] When faced with a prosecutor's offer to recommend a sentence of "time-served"—a frequently-used prosecutorial strategy in relatively minor cases—an innocent defendant may feel enormous pressure to cut his losses and to plead guilty in exchange for immediate freedom, especially if there is no discernable end to the potential period of pretrial incarceration.

bail suffer the brutalizing atmosphere of pretrial detention centers or, in desperation, plead guilty to unfounded charges in order to escape." Note, *Speedy Trial: A Constitutional Right in Search of Definition*, 61 Geo. L.J. 657, 658 (1973). Among its many virtues, then, the Act addresses this significant problem.

3. The Act promotes the perception that American criminal justice processes are fundamentally fair

a. Speedy trial principles have been inextricably linked to notions of fundamental fairness in criminal procedure for *centuries*. No less an authority on English common law than Sir Edward Coke maintained that "doing 'justice and right, according to the rule of law and custome of England' * * * included the quality of speed." Herman, *supra*, at 162-163 (quoting Sir Edward Coke, I INSTITUTES OF THE LAWS OF ENGLAND 56 (LONDON: E. & R. BROOKE (1797)).[9] The Habeas Corpus Act of 1679 provided prisoners with a remedy for "prolonged incarceration without trial." Herman, *supra*, at 164. And the Framers followed suit, expressly guaranteeing that

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[9] Coke traced the principle that avoidance of undue delay is an essential ingredient of fair criminal process in a free society all the way back to the Magna Carta. *See* Herman, *supra*, at 163 (quoting Coke as stating that "the law of England is a law of mercie * * * for three causes: First, that the innocent shall not be worn and wasted by long imprisonment, but (as hereby, and by the statute of Magna Charta appeareth) speedily come to trial").

speedy trials would be provided to criminal defendants under our Constitution as a matter of right. *See* U.S. Const. amend. VI.

By the time the Speedy Trial Act was enacted in 1974, our society's agreement with the view that any system for adjudicating criminal cases must "give[ ] the prisoner full and speedy justice, * * * without detaining him long in prison," Coke, *supra*, at 43, was beyond question. But the Act also reinforces specific bedrock tenets of criminal procedure, including the right to trial by jury and the principle that a person accused of a crime is deemed innocent, unless and until *the government* satisfies its burden of establishing guilt beyond a reasonable doubt. Long gone are the repudiated practices of previous eras in which an individual could be arrested summarily and held in prison "no matter how long that may be, until he can prove by inquest that he is innocent." Henry de Bracton, II ON THE LAWS AND CUSTOMS OF ENGLAND: 1240-1260, 347 (HARV. UNIV. PRESS, 1968). Under the American system of criminal justice, accused individuals may stand silent, and the burden of bringing forth evidence that establishes each element of the alleged crime beyond a reasonable doubt must be shouldered by the government. *Cf. In re Winship*, 397 U.S. 358, 363 (1970) ("There is always in litigation a margin of error * * * which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant has liberty—this margin of error is reduced as to him by the process of placing on the

other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt." (quoting *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958)); *see also Dickey v. Florida*, 398 U.S. 30, 37 (1970) ("State claims have never been favored by the law, and far less so in criminal cases.").

Thus, by prescribing a specific time frame within which indictment and trial must commence as a matter of federal law, the Act reflects our core values regarding individual liberty and the relationship between the government and its citizens. Indeed, the very fact that there *is* a Speedy Trial Act makes it abundantly clear that when the United States seeks to invoke its awesome power to accuse an individual of criminal behavior and to deprive him of his liberty on that basis, government officials may not merely rest on their laurels, but out of respect for the sobering task of restricting freedom, must move forward deliberately and expeditiously in the effort to prove the case.

b. Notwithstanding these clear benefits to defendants, some have argued that the Act *undermines* fairness for defendants in practice, because it effectively restricts the amount of time for preparation of the defense. *See, e.g.*, Ames, *supra*, at 95-96; Ariola, *supra*, at 739-743; Robert L. Doyel, *The Federal Speedy Trial Act: Stampede into Ambush*, 16 John Marshall L. Rev. 27 (1982). Speedy trial laws work to a defendant's distinct disadvantage, the argument goes, because his counsel must investigate the crime

and respond to the accusations within the relatively short timeframe set forth in the statute, while the prosecutor has unlimited time (and substantial resources) to gather evidence and to develop arguments prior to seeking an indictment.

Unfairness to the defendant is not inevitable, however. *See* Ariola, et al., *supra*, at 746-753. As explained in Part B(1), *infra*, defense counsel has a ready remedy under the Act, to mitigate concerns about unfairness to the defendant due to insufficient time to prepare an adequate defense, *see* 18 U.S.C. § 3161(h)(7), and courts often utilize this "ends of justice" authorization when evaluating the equities in the context of a particular case. *See, e.g., United States v. Harris*, No. 08-1192, 2009 WL 1515425, at *3 (7th Cir. June 2, 2009); *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008); AOUSC Sixth Report, at 26 (nearly a quarter of the total incidence of excludable delay in 1980 was due to ends-of-justice continuances).

4. The Act permits effective enforcement of the Sixth Amendment's speedy trial guarantee

The Framers did not define "speedy" when they guaranteed the right to a speedy trial, and for constitutional purposes, this Court has also declined to provide any definition, *Barker v. Wingo*, 407 U.S. 514, 523 (1972), much to Congress's dismay, *see* S. Rep. No. 96-212, at 6 (lamenting the "[f]ederal courts' professed inability to gauge the constitutional implications of competing speedy trial interests other

than on a case-by-case basis"). Before the Act, lower federal courts "vari[ed] widely in their findings of violations of the speedy trial right." Note, *Speedy Trial*, *supra*, at 660. But with the Act's pronouncement that a trial should ordinarily commence within 70 days from the date of an indictment or first appearance, courts now have general parameters for an analysis of the scope of a speedy trial violation. *See, e.g., United States v. Bieganowski*, 313 F.3d 264 (5th Cir. 2002) ("It will be the unusual case * * * where the time limits under the Speedy Trial Act have been satisfied but the right to a speedy trial under the Sixth Amendment has been violated."); *cf.* Frase, *supra*, at 706 ("There is some similarity between the standards for dismissal under the Act and under the [S]ixth [A]mendment * * * .").[10]

From the standpoint of judicial economy, the Act thus provides needed clarity, which advances the cause of efficient administration of criminal justice overall because weak Sixth Amendment cases are weeded out. Indeed, as a probable result of the Act's clear boundaries, there has been no flood of cases brought in federal courts seeking to make a constitutional case out of a relatively minor delay;

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[10] To be sure, a defendant's statutory and constitutional rights are not entirely coterminous. *See* Herman, *supra*, at 205. But the Act provides something of a benchmark for constitutional cases, and such yardsticks can often be useful measures in the evaluation of unmeritorious claims.

rather, the flow of such actions has only amounted to a trickle. *See* Herman, *supra*, at 206 (the Act may have had the effect of reducing the volume of Supreme Court cases related to constitutional speedy trial analysis).

B. The Act's Automatic Exclusions Should Be Interpreted In The Context In Which They Were Devised And Without Regard To Any Perceived Benefit That The Defense Might Derive From The Delay

1. The statutory listing of automatic exclusions is clear and comprehensive, and the listed exclusions were deliberately designed to permit flexibility without undermining the Act's objectives

The court of appeals below read 18 U.S.C. § 3161(h)(1) to authorize an automatic exclusion from the Speedy Trial Act's 70-day limitations period for the time that the parties spend *preparing* pretrial motions, Pet. App. 8a, even though the Act expressly provides at subdivision (D) that only the time from "filing" through "disposition" of such motions is automatically excluded. The court found persuasive other circuits' view that motion preparation delay was automatically excludable by virtue of the "including but not limited to" language of section 3161(h)(1). *Id.* at 7a. But it is clear from the text of the statute that Congress did not intend this language to authorize courts to *ignore* the listed automatic exclusions by expanding the listed categories.

As petitioner's brief on the merits makes clear, Congress refused to leave it up to the courts to delineate the circumstances that warrant automatic suspension of the Speedy Trial Act clock. Instead, Congress expressly and intentionally used its reasoned judgment to set forth the specific time periods that are to be excluded automatically from the running of the Act's limitations period.

This Court has already acknowledged that Congress's enumerated list of automatic exceptions is "comprehensive[]." *Zedner*, 547 U.S. at 500. With a notable amount of detail, Congress has identified the specific circumstances that, in its view, require a compromise in speed in order to assure fair trials and "to make compliance with [fixed time limits] a realistic goal." S. Rep. No. 96-212, at 9. Furthermore, Congress has inserted a stop-gap measure designed to guarantee case-by-case consideration of due process concerns: it permits individual judges to assess whether the "ends of justice" require a continuance in the context of a particular case because the need for delay "outweigh[s] the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). The enumerated exclusions thus "afford the flexibility to handle both the unusual case [and] other practical problems certain to arise during the * * * implementation of [the] primary policies" of the Act. *See* S. Rep. No. 96-212, at 7. And there can be no serious dispute that Congress has covered every imaginable situation in

which it would be reasonable to stop the Speedy Trial Act clock.

Congress's deliberate policy judgments about the amount of delay that can be permitted without undermining the objectives of the Act should be respected, not recalibrated. Congress expended "considerable effort * * * to aggressively promote speedy trial goals without thwarting the ability of the * * * justice system to serve the needs of justice on a case-by-case basis," *id.* at 11, and the result of its work represents a reasonable accommodation of the competing objectives of swiftness and fairness in the federal criminal justice process. Moreover, it is well within Congress's purview to set time limitations that mandate speedy trials and then carve out exclusions to that limitations rule. *See Barker*, 407 U.S. at 522-523 (declining to establish constitutional time limitations because doing so "would require this Court to engage in legislative or rulemaking activity"); *see also* Order Adopting Amendments to the Federal Rules of Civil Procedure, 406 U.S. 981, 982 (1972) (Douglas, J., dissenting) (arguing that "[t]his Court is not able to make discerning judgments between various policy choices" as regards the provision of speedy trials). The care that Congress exhibited in expressly and specifically setting forth automatically excludable time periods counsels against expansive interpretations of the Act's listed exclusions.

2. The fact that an automatic exclusion is requested by the defense, or that the defendant purportedly benefits from the delay, should have no bearing on this Court's evaluation of whether such exclusion is consistent with the purposes of the Act

The government has repeatedly emphasized that the party who requested the automatic exclusion from the Speedy Trial Act's limitations period in this case was *the defendant*. *See* Br. in Opp. (I) (framing the question presented as whether "time granted at the request of the defendant to prepare pretrial motions qualifies as 'delay resulting from other proceedings concerning the defendant'" for the purpose of 18 U.S.C. § 3161(h)(1)); *see also id.* at 11 n.3 (asserting that an exclusion granted pursuant to a court's routine scheduling order "presents a different question" from whether "a period of delay specifically requested by a defendant" should be deemed excludable).

The government's observation conjures up a contention that frequently appears in cases and commentary regarding the Speedy Trial Act: that the defendant should not be heard to complain about a trial delay that he brings upon himself. *See* Pet. App. 7a (opinion in *United States v. Bloate*, 534 F.3d 893, 897-898 (8th Cir. 2008)); *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 913-914 (10th Cir.), *opinion supplemented on reh'g*, 881 F.2d 866 (10th Cir. 1989); *see also United States v. Jarrell*,

147 F.3d 315, 318 (4th Cir. 1998) (noting that such reasoning has "intuitive appeal"). More broadly, the government's assertion implies that a requested delay in the commencement of trial necessarily redounds to the benefit of the defendant, so defendants should not be heard to complain about exclusions to the Speedy Trial Act's limitations period at all. *Cf.* Ames, *supra*, at 83 ("The defense has a built-in interest in delay * * * ." (citation omitted)); Robert L. Misner, SPEEDY TRIAL: FEDERAL AND STATE PRACTICE 212 n.5 (1983) ("The defendant, of course, is in no hurry for trial because he wishes to delay his day of reckoning as long as possible."); Seymour Statement, *supra*, at 30404 ("Except in the rarest case, the last thing in the world a guilty defendant wants is a speedy trial."). These types of allegations do not relate in any meaningful way to Congress' intent in permitting automatic exclusions in light of the purposes of the Act; thus, they should not influence the Court's determination in this case.

a. To be sure, in section 3161(h)(1), Congress expressly excluded "[a]ny period of delay resulting from other proceedings concerning the defendant." But, contrary to the government's suggestion, this exclusion reflected Congress's concerns about the *fairness* of criminal trials in the context of the new limitations period, not defense manipulation.

The Senate committee report for the original Speedy Trial Act bill makes this clear. The report notes that section 3161(h)(1) "allows the court to exempt from the time limits[] time consumed by

'proceedings concerning the defendant.'" S. Rep. No. 93-1021, at 35 (1974). The report also indicates that the exemption should be "considered [in conjunction] with all the enumerated exclusions from the time limits contained in 3161(h)," *ibid.*, and, viewed from that vantage point, the exclusion merely reflects a balancing of interests that "assures that the time limits do not fall too harshly upon either the defendant or the Government." *Ibid.*

If collateral proceedings related to defendants that consume time, such as mental competency proceedings or examinations, are *not* excluded from the Act's limitation's period, then a clock-conscious trial judge would be less inclined to permit such proceedings, and speed might trump due process in regard to that defendant. Alternatively, a trial judge who is primarily concerned with such proceedings, no matter how long they take, could easily dwell on collateral concerns, to the detriment of the public's interest in speedy trials and perhaps even at the risk of public safety because the indictment would be dismissed. An automatic exclusion for "proceedings concerning the defendant" thus creates the appropriate incentives for the institutional actors to pursue important collateral proceedings that promote fair trial procedures without scuttling the case or substantially impairing the intended objectives of the Act.

In effect, then, by enacting section 3161(h)(1), Congress avoided being in the "anomalous" position of either requiring swift justice with compromised due

process because of insufficient time to address valid collateral concerns, or forcing dismissal of an indictment when the necessary delay results from proceedings "proper[l]y undertaken to protect [a defendant's] interests in a fair adjudication of the charges against [the defendant]." S. Rep. No. 96-212, at 9. The alternative characterization of Congress's motivation—*i.e.*, that Congress undertook to exclude the time related to "proceedings concerning the defendant" because a manipulative defendant might ask for such proceedings as a means of running out the clock—finds no support.[11]

b. It is also misguided to conceive of the exclusions from the Speedy Trial Act's limitations mandate as benefiting only the criminal defendant. Delay in the commencement of trial proceedings certainly might benefit defense *counsel*, who has the responsibility of investigating the alleged criminal activity and of preparing a constitutionally effective response to the government's allegations under the time constraints set forth in the Act. *See* Misner, *supra*, at 212 n.5 ("[O]ver-worked * * * defense attorneys depend on delay in order to cope with their

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[11] The view that a defendant should not be permitted to seek redress for violation of a Speedy Trial Act claim if defense counsel sought a delay is also manifestly inconsistent with this Court's no-waiver holding in *Zedner*, 547 U.S. at 503-506. As the Fourth Circuit notes, the argument "denigrates the interest of the public by effectively allowing a defendant to relinquish his otherwise unwaivable right to a speedy trial." *Jarrell*, 147 F.3d at 318.

heavy caseloads."). But the speedy trial clock stops *both* for the defense lawyer *and* for the prosecutor, so any litigation benefit that defense counsel receives as a result of gaining additional time to prepare for trial is offset by the gain to the prosecutor as well.

More important, a defense counsel's purported desire for delay is not always shared by the defendant. Indeed, this is one area of the law in which a defense lawyer's interests and that of his client may not be aligned.

While it may well suit a defense lawyer to dawdle in trial preparation, he does so to the detriment of his client, who, meanwhile, might be languishing in jail. *Barker*, 407 U.S. at 532-533; *see also* H. Rep. No. 93-1508, *reprinted in* 120 Cong. Rec. 7401, 7408 (1974) ("A defendant who is required to wait long periods to be tried suffers from a magnitude of disabilities which in no way contribute to his well being."); Godbold, *supra*, at 265-266 (even a guilty untried defendant "may prefer the chance of acquittal to indefinite pretrial confinement"). Even when a defendant remains free on bond pending trial, delay of his trial is not necessarily a bonus. "[H]e is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility," *Barker*, 407 U.S. at 533—circumstances that continue unless and until such defendant is provided with an opportunity to clear his good name. Not surprisingly, some defendants who are released before trial "wish to get on with the hearing * * * and the minimization of the

impediments to normal life which attend public accusation." Godbold, *supra*, at 265.[12]

On the flip side, studies have shown that delaying trial can provide concrete benefits to *the prosecution* in some cases. "[A]n arrest or indictment in one case may provide leads to other[s]" that "could be compromised if the defendant in the first case [is] brought to trial speedily." Mahoney, *supra*, at 79. Also, a case might be weak in the prosecutor's view, making her "not anxious to bring [the case] to trial or other resolution." *Ibid.* Because "there will almost inevitably be some situations in which a prosecutor's office will not want to see an individual case proceed rapidly," *ibid.*, it cannot be said as a general matter that it is the defense, rather than the government, that benefits most from an automatic exclusion that causes a delay.

Thus, this Court should reject the government's subtle suggestion that defendants' complaints about exclusions from the Speedy Trial Act clock should be substantially discounted. In the final analysis, whether or not defendants as a whole are helped or hurt by such exclusions cannot be conclusively determined. What *is* known, however, is that

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[12] And, of course, the further back the trial date is pushed, the greater the chance that key witnesses and critical evidence will not be available to rebut the government's case. *See, e.g., Dickey*, 398 U.S. at 38 (while defendant pressed for the commencement of trial, two witnesses died, another became unavailable, and police records were lost).

Congress intended the Act as a whole to be evaluated with *the public's* interest "firmly in mind." *Zedner*, 547 U.S. at 501; *see also* Godbold, *supra*, at 266 ("Whatever the calculus of injury and advantage resulting from delay, in criminal cases * * * public safety, life, and liberty may be affected."). There is no need to speculate about winners and losers *as between the parties* in interpreting the Act and its exclusions, because it is abundantly clear that Congress viewed *all* of the institutional actors as having an interest in prolonging the trial process such that *none* could be trusted to do what was needed to further the public's interest in regard to the provision of speedy trials. *See* Misner, *supra*, at 212 n.5 ("[W]hile it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial."). Consequently, "the Speedy Trial [Act] contemplates that each participant in that system [will] become an important factor in increasing the efficiency of the Federal courts in order to achieve the speedy disposition of criminal cases." H. Rep. No. 93-1508, *supra*, at 7404.

C. Section 3161(h)(1)(D) Strikes A Careful Balance Between The Interests Of The Public And The Administrative Needs Of Criminal Justice Participants, And Expanding The Motions Exclusion To Include Preparation Time Threatens That Balance

The text of 3161(h)(1)(D), which specifically excludes only that time between the "filing" and the

"disposition" of pretrial motions from the Speedy Trial Act clock, manifests a policy judgment that Congress made after taking into account both due process and speedy trial objectives. *See supra* Part B(1). In the context of a regime that values swift justice, Congress apparently considered due process in motions practice best served by providing additional time to *judges* to consider and rule on filed pretrial motions, but not gifting the litigants with excludable time for the preparation of such motions.[13] This conclusion is entirely consistent with the overall goal of increasing efficiency in case management, because the judge bears ultimate responsibility for the movement of cases through the system, and also because, given appropriate time to consider a dispositive motion, the judge might order the case dismissed.

As petitioner explains in his brief on the merits, it could not be more obvious that Congress's policy choice in regard to the scope of the motions exclusion

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[13] The American Bar Association and the National Conference of Commissioners on Uniform State Laws have made a similar judgment call. In model speedy trial proposals, each would ensure adequate time for judges, and limit the parties, by excluding the time required for adjudication of pretrial motions, but not for their preparation. *See* Am. Bar Ass'n, ABA STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES, Standard 12-2.3(b), at 49 (3d ed. 2006) (excluding "[t]ime required for the consideration and disposition of pretrial motions"); Nat'l Conference of Comm'rs on Uniform State Laws, UNIF. RULES OF CRIM. PROCEDURE, Rule 722(f)(2), at 251 (1987) (excluding delays resulting from motions on complex issues, "including the time needed to prepare *for a hearing* on the motion" (emphasis supplied)).

was deliberate. *See* S. Rep. No. 96-212, at 33-34, (Congress specifically rejected as "unreasonable" a proposal that "all time consumed by motions practice, from preparation through their disposition, should be excluded").[14] Those courts of appeals that have nonetheless concluded that an exclusion for motion preparation is consistent with the language of the Act have relied, in part, on the purported inequity of excluding preparation time for the party that prepares and files a *response* to a motion, but not excluding preparation time for the party that files the motion itself. *See United States v. Oberoi*, 547 F.3d 436, 450-451 (2d Cir. 2008) ("We see no reason Congress would accommodate the needs of one party but not the other."), *petition for cert. filed*, 77 U.S.L.W. 3596 (U.S. Apr. 14, 2009) (No. 08-1264). As noted above, however, in regard to motions practice in an age of speedy trials, Congress was balancing the needs of judges, on the one hand, and the public, on the other, and it specifically chose *not* to provide the parties with automatically excludable time in regard to the preparation of pretrial motions, without regard to whether one party was advantaged as a result.

In any event, there is no substantial inequity involved in the application of section 3161(h)(1)(D),

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[14] Congress also fully explained its reasoning: in those cases "where the issues of law are not novel and the issues of fact simple," litigants needed no extra time for preparation, while, in more complex circumstances, the remedy, granted sparingly, should be an "ends of justice" continuance. *Id.* at 34.

given the relatively short and generally fixed time periods that local court rules provide for preparing responsive pleadings. *See, e.g.*, E.D. Mo. R. 4.01(b) (requiring the party opposing a motion to file a response within five days of service). And compared to the response, preparation of an initial motion can occur over a much broader and more variable period, and at the whim of the moving party, which would (1) leave courts hard-pressed to "determine a point at which preparation actually begins," S. Rep. No. 96-212, at 34, and (2) make it difficult for legislators to foresee the amount of additional delay that will result from excluding time related to the preparation of such motions.

The delays that would result from recognizing an automatic exclusion of motion-preparation time are also likely to be substantial. *Cf.* S. Rep. No. 96-212, at 34 cautioning that (the motions exclusion "could become a loophole which could undermine the whole Act"). In the two years following the amendments to the Act that expanded section 3161(h)(1)(D) to include the period from "filing" to "disposition," the incidence of periods of motion-related excludable delay increased *by more than 100 percent*. Those delays tended to be significantly longer in length, as well: in 1979, 90 percent of motions delays lasted 10 days or less, and only three percent lasted 43 days or more, while in 1981, 32 percent of motions delays were 10 days or less, and 25 percent were 43 days or more. *See* AOUSC Fifth Report on the Implementation of

Title I of the Speedy Trial Act of 1974, at 26 (Sept. 1980); Ames, *supra*, at 87.

Given that motions-related exclusions alone made up more than one-third of the total incidence of excludable delay under section 3161(h) in both 1979 and 1980, and forty percent in 1981, *see* AOUSC Sixth Report, at A-2; AOUSC Fifth Report, *supra*, at 22; Ames, *supra*, at 87. Congress's deliberate decision in 1979 to amend section 3161(h)(1)(D) to broaden the motion-related exclusion, *see* Pet. Br. at 25-32, had a material effect on the overall speed of federal criminal case adjudication at that time. But, of course, any such increase followed from a specific congressional determination that automatically excluding the period of time from the filing of a motion until the disposition of the motion is necessary for due process and/or feasibility in criminal cases. Congress has made no similar determination in regard to the likely increases in case disposition times that would result from an automatic exclusion for the preparation of motions. And, indeed, when Congress considered precisely this question previously, it pointedly declined to expand the scope of the exclusion. *See* Pet. Br. at 28.

Rather than countenance an additional delay in the running of the Speedy Trial Act clock that Congress has already rejected, this Court should conclude that Congress meant what it said when it struck the balance between speed and justice that resulted in the exclusion at section 3161(h)(1)(D).

CONCLUSION

For the reasons set forth above and in the petitioner's brief, this Court should reverse the judgment of the court below.

Respectfully submitted,

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